UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 99-CV-2496 (GK)**
v.	)	
	)	**Next Court Appearance:**
PHILIP MORRIS USA INC. (f/k/a	)	**Trial (Ongoing)**
PHILIP MORRIS INCORPORATED), et	)	
al.,	)	
	)	
Defendants.	)	

WRITTEN DIRECT TESTIMONY

OF

JAMES A. LANGENFELD, Ph.D.

Submitted by Joint Defendants Pursuant to Order #471

http://legacy.library.ucsf.edu/tid/nyq07a00/pdf
Source: http://www.industrydocuments.ucsf.edu/docs/kyhl0001

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1 **I. QUALIFICATIONS**

2 **Q. Dr. Langenfeld, please state your name.**

3 A. James A. Langenfeld.

4 **Q. Are you currently employed?**

5 A. Yes, I am.

6 **Q. What is your current occupation?**

7 A. I am Director of LECG, an economics and finance consulting firm, in Evanston, Illinois.

8 I am also an Adjunct Professor at Loyola Law School.

9 **Q. Dr. Langenfeld, please describe your educational background for the Court.**

10 A. I received my Ph.D. in Economics from Washington University in St. Louis in 1983.

11 Before that I received a Master's in Economics from Washington University and a Bachelor's in

12 both Economics and Literature from Georgetown University.

13 **Q. What was the topic of your doctoral dissertation?**

14 A. My dissertation measured the impact of government automobile regulations and rulings

15 (including the EPA and the National Highway Transportation Safety Board) on the industry and

16 consumers.

17 **Q. Did your dissertation apply the methodology used by an economist?**

18 A. Yes, it did.

19 **Q. Have you ever taught economics at the college level?**

20 A. Yes, I taught for about 3 years at Washington University and at the University of

21 Missouri-St. Louis. I am also currently an Adjunct Professor, teaching law and economics at

22 Loyola Law School in Chicago.

23 **Q. Dr. Langenfeld, have you ever been employed by the federal government?**

24 A. Yes, several times.

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1 **Q. For what agency or part of the government have you worked?**

2 A. First, with the Interstate Commerce Commission. Then, I served two different stints with

3 the Federal Trade Commission (FTC).

4 **Q. Please tell us about your professional employment starting with the ICC.**

5 A. I was an economist at the Interstate Commerce Commission for about a year in 1971-

6 1972. I evaluated the impact of certain ICC rulings on, for example, railroads and shippers.

7 After that, I worked for Amtrak as a statistical analyst for a year. I left Amtrak to work on my

8 graduate degrees in St. Louis. I then started work for the Federal Trade Commission in 1979.

9 **Q. What was your first position at the FTC?**

10 A. From 1979-1982 I was a staff economist in the Division of Economic Evidence in the

11 Bureau of Economics.

12 **Q. What were your principal duties as a staff economist?**

13 A. I worked primarily on antitrust matters, including investigations of possible instances of

14 collusion and conspiracy. I also evaluated, for example, the impact of mergers on competition

15 and consumers.

16 **Q. When did you advance to a different position at the FTC?**

17 A. In 1982 I was promoted to Assistant to the Director for the Bureau of Consumer

18 Protection. Thereafter I became Assistant to the Director for the Bureau of Competition.

19 **Q. What responsibilities did you have as Assistant to the Director for the Bureau of**

20 **Consumer Protection?**

21 A. I provided economic analyses of various consumer protection rules and had some

22 responsibilities for case work. I analyzed, for example, the impact of proposed FTC rules on

23 firms and consumers in several industries.

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1 **Q. What responsibilities did you have as Assistant to the Director for the Bureau of**
2 **Competition?**
3 A. I worked on various types of antitrust cases, provided analysis to the Bureau Director,
4 and met with staff from the bureaus and the Commission.
5 **Q. During this first stint you had at the FTC, what other positions did you hold, if any?**
6 A. I was an Economic Advisor to Commissioner Calvani from 1984-85. In this position, I
7 worked on a variety of consumer protection and antitrust matters. I provided advice and input to
8 Commissioner Calvani for use in his decision making process, including advice on proposed
9 consumer protection rules, specific cases, and the FTC's ad substantiation policy. Again, these
10 analyses involved evaluation of the impact of proposed FTC actions on firms and consumers.
11 **Q. What is the FTC's ad substantiation policy statement you are referring to?**
12 A. The FTC's policy statements on ad substantiation, as well as on unfairness and deception,
13 are written encapsulations of FTC policy that reflect key aspects of previous FTC cases and
14 enforcement actions. Based on my experience they are designed to explain FTC enforcement
15 standards, so that companies are on notice as to what actions the FTC is likely to challenge, and
16 why. I explain them in more depth later.
17 **Q. When you left your position as Economic Advisor to Commissioner Calvani, was**
18 **this the end of your first stint at the FTC?**
19 A. Yes, it was.
20 **Q. What did you do then?**
21 A. I was a Senior Economist for General Motors from 1985 to 1987.
22 **Q. At General Motors, what kind of work did you do?**

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1 A. As a member of the economics staff at GM, I conducted analyses of regulations affecting
2 the auto industry regarding safety, exhaust emissions, corporate fuel economy standards, and
3 other issues.

4 **Q. Did you use and apply principles of economics in this position?**

5 A. Yes, I did. I evaluated the impact of proposed government regulations and actions on
6 automobile makers and consumers.

7 **Q. What did you do after you left General Motors?**

8 A. I went back to work for the Federal Trade Commission from 1987 to the end of 1993.

9 **Q. What position did you have when you went back to the FTC in 1987?**

10 A. I was Deputy Director of Economic Policy Analysis and Associate Director for Special
11 Projects at the Bureau of Economics from 1987 to 1988. In that role, I supervised a number of
12 studies of the impact of regulations and governmental actions on firms and consumers, including
13 FTC actions.

14 **Q. Dr. Langenfeld, did you receive any awards while at the FTC?**

15 A. Yes, I did. I received the Senior Executive Service (SES) award and the FTC
16 Distinguished Service award.

17 **Q. What did you do to merit receiving them?**

18 A. The SES award was given to certain senior federal government officials, and was
19 awarded for particular excellence in service. The FTC award was given for my accomplishments
20 during my years of service at the FTC.

21 **Q. Dr. Langenfeld, when at the FTC, did you have occasion to participate in any**
22 **oversight or regulation of the tobacco industry?**

23 A. Yes, very occasionally.

24 **Q. Please tell the Court about those occasions.**

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1 A. I never had direct responsibility for or significant involvement in an investigation of
2 cigarette advertisement or marketing practices. I did have some limited input into the early-
3 1980s investigation of *Barclay* cigarette advertising; FTC economist Dr. Joseph Mulholland's
4 1989 study of the effect of tobacco advertising; and the 1990s-era first investigation of Joe
5 Camel cigarette advertising's possible effect on youth smoking.

6 **Q. Did you have substantial responsibility for or participation in any of these items?**

7 A. No, I did not.

8 **Q. Do you have involvement in any other cigarette or tobacco-related cases while at the**
9 **FTC?**

10 A. Not that I recall.

11 **Q. After you left the Federal Trade Commission, what did you do?**

12 A. I went to work as a Vice President of Lexecon, Inc., an economics consulting firm. Then,
13 in 1995, I took my current position at LECG.

14 **Q. Dr. Langenfeld, are you a member of any professional organizations?**

15 A. Yes. I am a member of the American Economic Association; the Western Economic
16 Association International; and the Southern Economic Association. I am an associate member of
17 the American Bar Association, including the Antitrust section, Healthcare section, and the
18 Intellectual Property section. I am also a member of the Licensing Executives Society.

19 **Q. Dr. Langenfeld, does your work as an economic consultant include giving expert**
20 **testimony?**

21 A. Yes, it does.

22 **Q. Have you testified in court and before government agencies?**

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1 A. Yes. I have testified in federal and state court and before the European Commission on
2 various matters, as well as before the FTC and other government agencies in the United States
3 and abroad.

4 **Q. What percent of your time over the last year has been devoted to litigation?**

5 A. Approximately 30 to 40%.

6 **Q. What hourly rate do you charge for your work on this case?**

7 A. $500 currently, although it has been less in the past.

8 **Q. Is this the same as you charge other clients for consulting?**

9 A. Yes, it is.

10 **Q. Have you ever published any articles or books, Dr. Langenfeld?**

11 A. Yes, I have published numerous articles and contributed to several books.

12 **Q. How many of your articles have been published in peer-reviewed journals?**

13 A. Approximately half of the 60 or so that I have published.

14 **Q. Can you explain the peer review process for the economics field?**

15 A. The peer review process is rather rigorous. You first submit your publication to a
16 professional, peer-reviewed journal. It is then reviewed by one to three individuals with
17 expertise in the field. Each journal has its standards, which the reviewers must follow. Once the
18 publication is screened by peers, it may or may not be accepted into the journal.

19 **Q. Are there any journals for which you are a peer reviewer or referee of submitted**
20 **articles?**

21 A. Yes, the Journal of Industrial Economics, the Antitrust Bulletin, and the Antitrust Law
22 Journal.

23 **Q. Do you also present your writings at conferences?**

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1 A. Yes. I routinely present at two or three conferences a year. Part of being an economist is
2 to continue to come up with ideas. Presenting these ideas at a conference stimulates discussion
3 among your peers and provides you with helpful information.

4 **Q. Dr. Langenfeld, would you consider that you have a special expertise within the field**
5 **of economics?**

6 A. Yes, I have a particular expertise in industrial organization.

7 **Q. What is industrial organization?**

8 A. Industrial organization studies both how companies compete with one another, and the
9 impact of government regulation and other government actions on industries and consumers. For
10 example, in my Ph.D. dissertation I analyzed the impact of federal safety and environmental
11 regulations on the automobile industry and auto buyers.

12 **Q. What do industrial organization economists analyze?**

13 A. Industrial organization economists frequently analyze the effects of actual and potential
14 government actions and regulations on firms' and consumers' incentives and behavior.

15 **Q. What types of organizations have you worked for as a consulting industrial**
16 **organization economist?**

17 A. I have been retained by private companies and associations, the Federal Trade
18 Commission, the State of California, the State of Oregon, the UK Office of Fair Trade, and the
19 European Commission's Directorate General for Competition.

20 **Q. Does the FTC employ industrial organization economists?**

21 A. The FTC's Bureau of Economics, in which I worked most of my FTC career, contains
22 one of the largest groups of industrial organization economists in the world.

23 **Q. Please describe the role that these economists play in the agency?**

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1 A. Yes, one of the primary missions of the Bureau of Economics is to analyze the effect of
2 government regulation on consumers and on competition. In addition, the FTC analyzes market
3 processes within the context of antitrust, consumer protection, and regulation, and provides these
4 analyses to both Congress and the Executive Branch.

5 **Q. How have you applied your industrial organization knowledge in this case?**

6 A. In my analyses in this case, I have applied my experience and training in industrial
7 organization to reach my conclusions about the formation of FTC policy, and the impact of the
8 FTC's policy and associated government actions on the actions of cigarette companies and
9 consumers.

10 **Q. Dr. Langenfeld, do you offer any legal opinions or legal conclusions in your analysis**
11 **and testimony?**

12 A. No, I do not. My opinions and conclusions are based on economic principles applied to
13 the facts and data I have studied.

14 **II. <u>METHODOLOGY</u>**

15 **Q. Dr. Langenfeld, would you describe in general what research you did in forming**
16 **your opinions in this case?**

17 A. Yes. I initially reviewed the allegations in court papers for this case. I then engaged in
18 systematic and detailed research on the FTC's actions relating to the cigarette industry, the
19 industry's and Congress' reactions to those initiatives, general information on the cigarette
20 industry, and general information on the FTC's policies regarding its consumer protection
21 mission.

22 **Q. More specifically, what the types of information did you initially gather?**

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1 A. I first obtained a great deal of public information about the FTC's actions related to
2 cigarettes beginning in the 1940s. This information included FTC reports to Congress, FTC law
3 enforcement and regulatory actions, its Cigarette Advertising Guides, FTC press releases, FTC
4 website postings, FTC testimony before Congress, FTC staff reports, and FTC Bureau of
5 Economics' working papers. I also obtained public information relating to the FTC from other
6 sources, such as the cigarette companies, the Better Business Bureau, the Cigarette Advertising
7 Code, and reports and petitions from members of the public interest groups and other
8 government agencies relating to smoking issues. I then studied the general FTC policy
9 statements relating to its consumer protection mission, including its statements on unfairness,
10 deception, and advertising substantiation. I also reviewed FTC consumer protection actions,
11 statements, and reports relating to other industries. I reviewed some of the expert reports
12 submitted in this case by the Government. I also reviewed documents listed on the cigarette
13 companies' websites that related to the FTC, specifically looking for information on the cigarette
14 companies' submissions to the FTC.

15 **Q. Did these sources contain any data useful in your analysis?**

16 A. Yes. For example, the FTC reports to Congress contain data on the cigarette companies'
17 promotional expenditures, broken down into advertising and other categories related to price
18 discounts. The FTC also publishes reports containing information on tar and nicotine ratings
19 according to the FTC's testing procedures.

20 **Q. What other information did you gather and consider?**

21 A. I reviewed the documents that were turned over in this case by the FTC. These included
22 a number of memoranda and other internal FTC documents. I also reviewed the depositions of
23 the FTC staff that were taken in this case, and the exhibits to those depositions. The FTC has
24 recently issued another report to Congress, which I also reviewed.

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1 **Q. Have you considered the documents and the testimony submitted to date by the**
2 **Government in this trial?**
3 A. Yes, I have, to the extent they appear to touch on my opinions and I can respond to them.
4 **Q. Are these materials the types of sources that an industrial organization economist**
5 **considers when performing an analysis of the effect of government actions on an industry?**
6 A. Yes.
7 **Q. Have you relied on these types of materials as part of your analysis in other projects**
8 **that you have worked on as an industrial organization economist in the private sector?**
9 A. Yes.
10 **Q. Did you rely on these types of materials in the analyses that you performed as an**
11 **industrial organization economist at the FTC?**
12 A. Yes. These are the types of materials I used in the analyses I conducted while at the FTC
13 in investigations related to competition within a specific industry or set of industries, as well as
14 in consumer protection investigations.
15 **Q. Did you also rely on your background, education, training, and expertise in**
16 **reaching your opinions?**
17 A. Yes.
18 **Q. Can economic analysis shed light on issues in this case?**
19 A. Yes. For example, economic analysis can provide insight into the effect of government
20 actions on the behavior of the cigarette companies and the effect of government action on
21 consumer behavior.
22 **Q. Have you performed economic analyses of the issues in this case?**
23 A. Yes.

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1 **Q. Is there a standard set of steps an industrial organization economist takes to**
2 **perform an analysis of the effect of government actions on an industry?**
3 A. Yes. First, an industrial organization economist analyzes the nature of competition
4 within the relevant industry, which provides insight into, among other things, the incentives at
5 work among industry participants. Second, an industrial organization economist analyzes the
6 ability of government bodies to affect the behavior of industry participants. Finally, an industrial
7 organization economist examines the effects of *actual* government actions on company and
8 consumer behavior as well as the effects of *potential* government action on company behavior.
9 **Q. Are these tools accepted in your field?**
10 A. Yes.

11 **III. SUMMARY OF OPINIONS**

12 **A. General**

13 **Q. Dr. Langenfeld, you do plan to offer several opinions in this action, correct?**
14 A. That is correct.
15 **Q. What does the evidence you have reviewed reveal regarding the FTC's oversight**
16 **and actions regarding what representations could be made about cigarette smoking and**
17 **health effects?**
18 A. The actions of the FTC, an independent federal agency, and related government bodies
19 have substantially affected cigarette advertisements and marketing practices for over 50 years.
20 Key aspects of cigarette advertising, such as health claims and tar and nicotine yields, and have
21 been totally controlled by FTC-set and enforced parameters.
22 The FTC's policy of preventing unfair and deceptive business practices has effectively
23 prevented cigarette manufacturers from making what the FTC believes to be explicit and implicit

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1 health claims in cigarette advertisements, except in the few instances where the FTC has adopted
2 a policy of allowing and encouraging such claims.

3 **Q. What does the evidence you have reviewed reveal regarding one particular aspect of**
4 **the FTC's oversight and actions: low tar/low nicotine cigarettes and advertising?**

5 A. One area that the FTC has determined to be an implied health claim is the advertisement
6 of tar and nicotine ratings. The FTC's policy on advertising tar and nicotine ratings has changed
7 over time. It allowed advertisements with comparative tar and nicotine ratings, then banned
8 them, then allowed them again using an FTC approved testing method, and then forced the
9 cigarette companies to place these ratings in all of their ads. The cigarette companies have
10 complied with these changing FTC mandates, even as the FTC has studied and continues to
11 study its testing procedures.

12 **Q. What particular expertise or experience does the FTC have in regulating cigarette**
13 **advertising?**

14 A. The FTC cigarette advertising policy is informed by its unique experience in analyzing
15 the effects of advertising on consumer behavior. This is particularly true for cigarette advertising
16 and marketing practices. The FTC has and continues to work with Congress and other
17 government agencies on cigarette advertising and promotion. The FTC has changed its policies
18 based on its evaluation of recommendations from the public health community and information
19 provided by the cigarette companies. The FTC also has supported research by its staff and other
20 experts into various aspects of cigarette marketing.

21 **Q. Can you provide an example of one particular area of expertise the FTC has?**

22 A. Certainly. The FTC has been made aware of the potential for smoker compensation
23 relative to testing procedures at least since 1962, when the Assistant Surgeon General warned the
24 FTC of potential compensation. The cigarette companies warned the FTC that its testing

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1 procedures would not provide accurate information for how much tar and nicotine an individual
2 may smoke before the FTC adopted its testing procedure in 1967, and subsequently presented
3 detailed information on compensation. The FTC successfully challenged advertising that the
4 FTC believed could mislead consumers about the health effects of smoking low yield cigarettes,
5 and has prevented or caused firms to end such advertisements.

6 **Q. Can you provide a more detailed example of the FTC's involvement in low tar**
7 **products, and knowledge of the limitations of low tar products?**

8 A. Yes. The FTC extensively examined issues related to "compensation" during its
9 investigation of *Barclay* cigarettes in the early 1980s. The FTC examined the potential for vent-
10 hole blocking and the use of alternative methods to measure intake by smokers, including smoke
11 dilution measurement methods, analysis of constituent retention in smoked cigarette butts, and
12 the measurement of cotinine levels in smokers' plasma. The FTC reviewed information
13 provided by the cigarette companies, experts hired by the cigarette companies, public health
14 officials, and experts hired by the FTC. Despite the conclusion reached by various experts and
15 some of the cigarette companies that smokers of low-yield cigarettes often engage in substantial
16 compensatory smoking behavior, the FTC decided not to modify the FTC Method or its tar and
17 nicotine policy.

18 **Q. How has the FTC policy toward tar and nicotine information in cigarette**
19 **advertisements affected the nature of cigarettes sold in the United States over the past few**
20 **decades?**

21 A. FTC policy and enforcement actions have created incentives for cigarette manufacturers
22 to change the characteristics of cigarettes marketed and purchased by consumers. For example,
23 FTC policy, enforcement, and threat of enforcement actions have encouraged cigarette
24 manufacturers to offer more low tar and nicotine cigarettes, and have encouraged consumers to

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1 buy these products. However, FTC policy has limited health claims that cigarette companies can
2 make in promoting other potentially less hazardous cigarettes.

3 **Q. Has the FTC reviewed evidence regarding descriptive terms that defendants have**
4 **been used in association with low tar products, and the possible effect of those terms on**
5 **consumers?**

6 A. Yes. The FTC has monitored and taken action where it deemed appropriate relating to
7 the use of descriptors, such as "low tar" and "light," in cigarette advertising. The FTC has given
8 the cigarette companies guidance with respect to its policy on the use of descriptors in cigarette
9 advertising. As the FTC adjusted its view over time regarding "low tar"/"light" cigarettes, the
10 cigarette companies' conduct changed accordingly.

11 **Q. How did the cigarettes companies' conduct change accordingly?**

12 A. The cigarette companies have followed the FTC's tar descriptor policy.

13 **Q. Does the FTC continue to monitor and investigate the cigarette industry today?**

14 A. Yes, the FTC has and continues to actively monitor and limit cigarette companies'
15 marketing practices as part of its consumer protection policy, particularly in the areas of health
16 claims; low yield cigarettes and the FTC's mandated testing of tar, nicotine, and carbon
17 monoxide levels; and the potential for marketing cigarettes to youth.

18 **Q. Have the cigarette companies, including some defendants in this action, reacted to**
19 **that monitoring and FTC actions?**

20 A. Yes. For example, recent FTC actions designed to increase consumer awareness of
21 "compensation" issues have been followed by defendant cigarette company efforts to also inform
22 consumers about "compensation" issues. These efforts by the cigarette companies have included
23 placing disclaimers in "low tar" cigarette brand advertisements, providing information regarding
24 "compensation" issues on their respective company websites, and at times providing information

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1 along with cigarette packages themselves. Moreover, the cigarette companies continue to look to
2 the FTC for guidance on allowable practices.

3 **B. Overview of Responses to Government Contentions**

4 **Q. I would like you briefly to address some of the opinions offered by some of the**
5 **Government's experts, starting with one of the Government's expert economist, Dr. Jeffrey**
6 **Harris. Dr. Harris has testified at trial that the FTC has had "toothless involvement" in**
7 **regulating the tobacco industry. Trial Tr. at 2547-2548. Is this true in your opinion?**

8 A. No. As I explain below in Sections V-VIII of my testimony, the FTC has been extremely
9 active in controlling the actions of the tobacco industry, conducting investigations, and bringing
10 enforcement actions against cigarette manufacturers that it believes have, or may have, violated
11 its policies and engaged in what the FTC considered deceptive and/or unfair advertising. By way
12 of brief example of one of a large number of such actions I detail later in my testimony, the FTC
13 brought formal action against the cigarette companies in 1971 over inclusion of the Surgeon
14 General's warning in all advertisements. Given the duration, scope, and impact of FTC
15 oversight, in my opinion, Dr. Harris is simply wrong in asserting that the FTC has had "toothless
16 involvement."

17 **Q. In testimony before this court, Dr. Harris contended that the cigarette companies**
18 **stopped making explicit health claims in cigarette advertising as result of a collusive**
19 **agreement reached in late 1953/early 1954. Trial Tr. at 2620 – 2631. Have you concluded**
20 **that other factors forced the cigarette companies to cease making health claims in**
21 **advertising?**

22 A. Yes. The economic evidence indicates that the cigarette companies stopped making
23 health claims in advertising because of actions, or the threat of actions, by the FTC and other
24 entities.

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1 **Q. Can you provide the court with some examples of actions by the FTC and other**
2 **entities that affected the content of cigarette advertising in the early 1950s?**
3 A. Yes. First, as detailed below in Section V of my testimony, during the late 1940s and
4 early 1950s, the FTC successfully brought a series of formal actions against the major cigarette
5 manufacturers to stop the use of explicit health claims in cigarette advertisements. Second, as
6 detailed below in Section V.B of my testimony, the Better Business Bureau, in December 1953,
7 issued cigarette advertising standards restricting the use of health claims in cigarette advertising.
8 These advertising standards were based on FTC precedent developed in the earlier cases the
9 Commission brought against the cigarette companies. Finally, there is evidence that by early
10 1954, the FTC was successfully working privately with cigarette companies to stop explicit
11 health claims in cigarette advertising.
12 **Q. Dr. Harris asserted in his written direct testimony submitted in this case that the**
13 **Cigarette Advertising Code was used as a mechanism to enforce the defendants' alleged**
14 **collusive agreement not to compete on health claims. Dr. Harris specifically cites to the**
15 **Cigarette Advertising Code's restricting the advertising of Kent's Micronite filter as**
16 **evidence supporting his collusion theory. Written Direct Testimony of Jeffrey E. Harris, at**
17 **112. Do you agree with Dr. Harris?**
18 A. No. As I discuss below in Section V.F of my testimony, this restriction in the Cigarette
19 Advertising Code was included in response to the FTC's proposed Trade Regulation Rule (TRR).
20 As discussed in the Statement of Basis and Purpose (SBP) to the TRR, Micronite (or, as the SBP
21 says, "Kryptonite") filter claims would clearly have been restricted. Thus, the Cigarette
22 Advertising Code simply incorporates the provisions of the TRR in that respect.
23 **Q. Is this evidence consistent with Dr. Harris' theory that the FTC was ineffective in**
24 **changing cigarette advertising content (Trial Tr. at 2548)?**

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1 A. No. As detailed below in Sections V-VIII of my testimony, the FTC clearly had a
2 substantial impact on the content of cigarette advertising during this period.

3 **Q. Dr. Krugman also testified that "the very large expenditures made by the tobacco**
4 **companies on advertising and promotion would not be justified by the goal of brand**
5 **switching." Written Direct Testimony of Dean M. Krugman, at 151. Do you agree with this**
6 **opinion?**

7 A. No.

8 **Q. Why do you disagree?**

9 A. For one thing, Dr. Krugman focuses on aggregate cigarette advertising and promotion
10 numbers published by the FTC as the basis for his opinion. As I discuss later in Section __ of
11 my testimony, the majority of the cigarette advertising and promotion expenditures published by
12 the FTC are actually just pure price cuts. Dr. Krugman's use of these aggregate advertising and
13 promotion figures as a basis for his opinion is therefore misguided.

14 **Q. Are there other reasons why you disagree with Dr. Krugman's opinion?**

15 A. Yes. There is another economic flaw in Dr. Krugman's reasoning. Dr. Krugman focuses
16 on the brand switching argument, but does not address share protection issues. One share point
17 is worth hundreds of millions of dollars to cigarette manufacturers. It is therefore worthwhile for
18 cigarette companies to spend substantial sums of money to protect as well as take share.

19 **Q. In testimony before this court, Dr. Krugman also contended that restrictions**
20 **contained in the Master Settlement Agreement (MSA) with the states did not result in a**
21 **shift in cigarette advertising expenditures. Written Direct Testimony of Dean M.**
22 **Krugman, at 29-31. Do you agree with Dr. Krugman's opinion?**

23 A. No. As I discuss further in Section IX of my testimony, the restrictions in the MSA had a
24 clear impact on the cigarette companies' advertising expenditure level according to the FTC data.

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Cigarette advertising expenditures fell dramatically following the adoption of the MSA in 1998. Again, Dr. Krugman's simple use of aggregate FTC-reported spending numbers is misguided since only a small percentage of such monies are in fact devoted to traditional advertising vehicles. At the same time, monies devoted to price competition have increased, reflecting robust competition among the industry participants, including competition from firms that were not original participants to that settlement.

Q. I would like you briefly to address some of the opinions offered by one of the Government's experts, Dr. David Burns. In testimony before this court, Dr. Burns contended that the cigarette companies did not "voluntarily provide the public health agencies of the U.S. Government with any information about the elasticity of delivery." Written Direct Testimony of David M. Burns, at 47-48. Based on your review of the evidence, did the cigarette companies voluntarily provide the FTC with information about the "elasticity of delivery"/ "compensation?"

A. Yes. As detailed in Section VI.G of my testimony, the FTC has considered a substantial amount of information regarding compensation issues, and much of this information came from cigarette company submissions to the FTC.

IV. BACKGROUND: THE FTC'S POLICY ON CONSUMER PROTECTION AND HOW IT OPERATES

A. General Overview

Q. Dr. Langenfeld, would you please provide the Court with some background on the FTC and its stated purpose?

A. The FTC is an independent federal government agency charged with enforcing the U.S. antitrust and consumer protection laws, subject to Congressional oversight. According to the FTC, it was created in 1914 "to prevent unfair methods of competition in commerce…. Over the

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1 years, Congress passed additional laws giving the agency greater authority to police
2 anticompetitive practices." Guide to the Federal Trade Commission, Introduction, at 3,
3 http://www.ftc.gov/bcp/ conline/pubs/general/guidetoftc.htm, viewed on December 7, 2004 (JD-
4 063647). In 1938, Congress passed the Wheeler-Lea Act, which amended the FTC Act and
5 provided civil penalties for violations of Section 5 orders. In addition the Wheeler-Lea Act
6 amended Section 5 to proscribe unfair or deceptive acts or practices as well as unfair methods of
7 competition.

8 **Q. Does the FTC consider itself only to be a law-enforcement agency?**

9 A. No. The Commission was established not as a simple law-enforcement agency, but as an
10 administrative agency comparable to the Interstate Commerce Commission, in order to perform a
11 positive role of policy formulation where the courts, it seemed, would not have been as effective.
12 *See* Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling
13 of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of
14 Basis and Purpose of Rule, FTC, June 22, 1964, p. 141 (JD-061508).

15 **Q. How is the Federal Trade Commission organized?**

16 A. The Commission itself is composed of five Commissioners. These Commissioners are
17 nominated by the President and confirmed by the Senate, and each serves a seven-year term.

18 **Q. Does each Commissioner oversee a different aspect/area of the Federal Trade**
19 **Commission?**

20 A. No, they each have responsibility for overseeing the entire Commission.

21 **Q. What are the bureaus of the FTC?**

22 A. The FTC currently has three bureaus: Bureau of Competition, Bureau of Consumer
23 Protection, and Bureau of Economics. The bureaus address different subject matter areas that
24 fall under the FTC's purview and assist the Commission in fulfilling its responsibilities.

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1 **Q. What subject matter area does the Bureau of Competition focus on?**

2 A. The Bureau of Competition primarily focuses on enforcing federal antitrust laws.

3 **Q. What subject matter area does the Bureau of Consumer Protection focus on?**

4 A. The Bureau of Consumer Protection's stated responsibility is "to protect consumers
5 against unfair, deceptive or fraudulent practices." Guide to the Federal Trade Commission, at 7,
6 http://www.ftc.gov/bcp/ conline/pubs/general/guidetoftc.htm, viewed on December 7, 2004 (JD-
7 063647).

8 **Q. What subject matter area does the Bureau of Economics focus on?**

9 A. The Bureau of Economics provides economic analysis in conjunction with the other two
10 bureaus, and researches various topics of interest to the FTC and others.

11 **Q. Has the FTC described the functions of the Bureau of Economics?**

12 A. Yes, the FTC says that the Bureau of Economics:

13 …provides economic analysis and support to antitrust and consumer protection
14 investigations and rulemakings. It also analyzes the impact of government
15 regulation on competition and consumers and provides Congress, the Executive
16 Branch and the public with economic analysis of market processes as they relate
17 to antitrust, consumer protection, and regulation.

18 Guide to the Federal Trade Commission, at 25, http://www.ftc.gov/bcp/conline/pubs/general/
19 guidetoftc.htm, viewed on December 7, 2004 (JD-063647).

20 **Q. What does bureau staff at the FTC do?**

21 A. The bureaus' staff and management conduct investigations, engage in research, and make
22 recommendations to the five commissioners regarding law enforcement and regulatory activities.
23 The bureaus' staff also interact directly with companies that are the subject of an FTC
24 investigation.

25 **Q. Can the FTC request evidence from companies when conducting an investigation?**

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1 A. The FTC can and does compel companies to provide documents and other evidence that
2 the Commission considers relevant to any particular investigation.

3 **Q. Dr. Langenfeld, could you explain the FTC's consumer protection policy?**

4 A. The FTC's policy has been and is to protect consumers from being harmed by potentially
5 unfair or deceptive acts. Potentially unfair and deceptive business practices include advertising
6 that may encourage consumers to make purchasing decisions based on misleading and/or
7 inadequate information or actions deemed unfair to consumers.

8 **Q. Has the FTC described its general policy on advertising practices?**

9 A. Yes, the FTC states that it enforces

10 the nation's "Truth-in-Advertising" laws. Whether ads appear on television or
11 radio, in newspapers or magazines, or on the Internet, these laws require
12 companies to tell the truth and to back up their claims with reliable, objective
13 evidence.

14 Annual Report of the Federal Trade Commission, 1998, p. 15 (JD-043614).

15 **Q. How does the FTC determine if an advertisement is unfair or deceptive?**

16 A. The FTC has developed over time basic policies regarding how it enforces its consumer
17 protection mandate.

18 **Q. Could you explain these consumer protection policies?**

19 A. The FTC summarized these policies in a series of policy statements developed in the
20 1980s, including the FTC Policy Statement on Unfairness, December 17, 1980 (JD-043485);
21 FTC Policy Statement on Deception, October 14, 1983 (JD-043526); and FTC Policy Statement
22 Regarding Advertising Substantiation (JD-043531). These statements provide insight into the
23 FTC's approach to protecting consumers, both before and after the statements were adopted.
24 These policy statements are a distillation of the FTC's policies as reflected in the enforcement of

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its consumer protection mandate. These policies are reflected in the consumer protection enforcement actions that it has brought against companies since the 1940s.

Q. Is the FTC's policy on advertising limited to preventing explicitly false statements?

A. No. As discussed in these statements and various FTC rulings, a particular advertisement does not necessarily have to contain explicitly false statements for the FTC to find it unfair or deceptive. The FTC may find an advertising practice unfair or deceptive if material information is omitted from the advertisement and/or the advertisement contains implied claims that the Commission does not consider adequately substantiated.

Q. Do these policies apply to the defendant manufacturers in this case?

A. Yes. The FTC has applied these principles to all the industries where it has jurisdiction, including cigarette manufacturers. The enforcement of the principles in these statements by the FTC, through lawsuits, trade regulation rules, and other means, limits and guides the actions of virtually all industries – including cigarette manufacturers.

B. <u>FTC Policy Statement on Unfairness</u>

Q. Dr. Langenfeld, could you describe the FTC Policy Statement on Unfairness?

A. The FTC Policy Statement on Unfairness was issued in 1980, although it captured principles applied before that time. According to the FTC, this Policy Statement "delineates the Commission's views of the boundaries of its consumer unfairness jurisdiction…." FTC Policy Statement on Unfairness, December 17, 1980 (JD-043485).

Q. What are the parts of the FTC Policy Statement on Unfairness?

A. According to the FTC, there are three general parts to its Unfairness Policy: consumer injury, violation of public policy, and unethical or unscrupulous conduct.

Q. Does the FTC explain these concepts?

A. Yes, in its Policy Statement on Unfairness, these concepts are defined as follows:

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Consumer Injury

To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.

Violation of Public Policy

The second … standard asks whether the conduct violates public policy as it has been established by statute, common law, industry practice, or otherwise. This criterion may be applied in two different ways. It may be used to test the validity and strength of the evidence of consumer injury, or, less often, it may be cited for a dispositive legislative or judicial determination that such injury is present….

[P]ublic policy … is used most frequently by the Commission as a means of providing additional evidence on the degree of consumer injury caused by specific practices. To be sure, most Commission actions are brought to redress relatively clear-cut injuries, and those determinations are based, in large part, on objective economic analysis….

Sometimes public policy will independently support a Commission action. This occurs when the policy is so clear that it will entirely determine the question of consumer injury, so there is little need for separate analysis by the Commission. In these cases the legislature or court, in announcing the policy, has already determined that such injury does exist and thus it need not be expressly proved in each instance.

Unethical or Unscrupulous Conduct

Finally, the third … standard asks whether the conduct was immoral, unethical, oppressive, or unscrupulous. This test was presumably included in order to be sure of reaching all the purposes of the underlying statute, which forbids "unfair" acts or practices. It would therefore allow the Commission to reach conduct that violates generally recognized standards of business ethics. The test has proven, however, to be largely duplicative. Conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well. The Commission has therefore never relied on the third element … as an independent basis for a finding of unfairness, and it will act in the future only on the basis of the first two.

FTC Policy Statement on Unfairness, December 17, 1980 (JD-043485).

C. FTC Policy Statement on Deception

Q. Dr. Langenfeld, can you describe the FTC's Policy Statement on Deception?

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A. The FTC Policy Statement on Deception contains three principal elements necessary for the Commission to find deception: a) "There must be a representation, omission, or practice that is likely to mislead the consumer"; b) "The act or practice must be considered from the perspective of the reasonable consumer"; and c) "The representation, omission or practice must be material." FTC Policy Statement on Deception, October 14, 1983 (JD-043526).

Q. Does the FTC further explain these elements in detail?

A. Yes it does. In its Policy Statement on Deception, the FTC describes these elements as follows:

> <u>There Must be a Representation, Omission, or Practice that is Likely to Mislead the Consumer</u>
>
> Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The entire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deceptions.
>
> Of course, the Commission must find that a representation, omission, or practice occurred. In cases of express claims, the representation itself establishes the meaning. In cases of implied claims, the Commission will often be able to determine the meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions. In other situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claim. In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.
>
> <u>The Act or Practice Must Be Considered from the Perspective of the Reasonable Consumer</u>
>
> The Commission believes that to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances. The test is whether the consumer's interpretation or reaction is reasonable. When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.
>
> <u>The Representation, Omission or Practice Must be Material</u>

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> … a representation, omission or practice must be a material one for deception to occur. A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely….
>
> The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned. Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose, safety, efficacy, or cost, of the product or service. Information is also likely to be material if it concerns durability, performance, warranties or quality. Information pertaining to a finding by another agency regarding the product may also be material.

FTC Policy Statement on Deception, October 14, 1983 (footnotes omitted) (JD-043526).

D. <u>FTC Policy Statement Regarding Advertising Substantiation</u>

Q. What does the FTC's Policy Statement Regarding Advertising Substantiation require?

A. The FTC states that it requires that advertisers be able to substantiate claims in advertising. The FTC's Substantiation Policy in particular requires "that advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated." FTC Policy Statement Regarding Advertising Substantiation (JD-043531).

Q. Does this statement address both what the FTC believes to be express claims, as well as implied claims?

A. Yes. The FTC's substantiation statement explains:

> Many ads contain express or implied statements regarding the amount of support the advertiser has for the product claim. When the substantiation claim is express (*e.g.*, "tests prove", "doctors recommend", and "studies show"), the Commission expects the firm to have at least the advertised level of substantiation. Of course, an ad may imply more substantiation than it expressly claims or may imply to consumers that the firm has a certain type of support; in such cases, the advertiser must possess the amount and type of substantiation the ad actually communicates to consumers.

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> Absent an express or implied reference to a certain level of support, and absent other evidence indicating what consumer expectations would be, the Commission assumes that consumers expect a "reasonable basis" for claims. The Commission's determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors relevant to the benefits and costs of substantiating a particular claim. There factors include: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation experts in the field believe is reasonable….
>
> One issue the Commission examined was substantiation for implied claims. Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims. The Commission will take care to assure that it only challenges reasonable interpretations of advertising claims.

FTC Policy Statement Regarding Advertising Substantiation Program (JD-043531).

E. <u>Methods the FTC Uses to Enforce its Consumer Protection Mandate</u>

Q. Dr. Langenfeld, what methods does the FTC use to carry out its consumer protection functions?

A. The FTC performs its consumer protection functions through a variety of methods that affect the behavior of firms and consumers. These methods have included:

(1) Monitoring and investigating advertising and marketing practices. *See* Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, FTC, June 22, 1964, p. 2 (JD-061508); *Annual Report of the Federal Trade Commission*, 1998, pp. 15-16 (JD-043614).

(2) Educating consumers and businesses regarding unfair and deceptive advertising practices. *See* Guide to the Federal Trade Commission, at 14-15, http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm, viewed on December 7, 2004 (JD-063647).

(3) Cooperating with public and quasi-public agencies to monitor advertising/marketing practices and educate businesses regarding legal advertising/marketing practices. *See Annual Report of the Federal Trade Commission*, 1998, p. 14-15 (JD-043614).

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(4) "Pre-screening" ads and issuing advisory opinions. *See Annual Report of the Federal Trade Commission*, 1963, p. 7 (JD-063277); Testimony of Robert T. Secrest (FTC, Acting Chairman), *False and Misleading Advertising (Filter-Tip Cigarettes)*, Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, 85th Congress, 1st Session, July 18-19 and 23-26, 1957, pp. 287-288 (JD000332).

(5) Promulgating advertising guides. *See Annual Report of the Federal Trade Commission*, 1959, pp. 69-70 (JD-063264).

(6) Entering into "voluntary" agreements with companies (a company that violates a "voluntary" agreement is immediately subject to an FTC enforcement action). *See* Testimony of Robert T. Secrest (FTC, Acting Chairman), *False and Misleading Advertising (Filter-Tip Cigarettes)*, Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, 85th Congress, 1st Session, July 18-19 and 23-26, 1957, pp. 278-279 (JD-000332); *Annual Report of the Federal Trade Commission*, 1959, p. 69 (JD-063264).

(7) Promulgating trade regulation rules. *See* Guide to the Federal Trade Commission, at 29, http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm, viewed on December 7, 2004 (JD-063647).

(8) Litigating against companies that engage in what the FTC believes are unfair or deceptive practices. *See* 15 USCS § 45 (2002); FTC Policy Statement on Deception, October 14, 1983 (JD-043526).

The FTC continues to have and, where the FTC considers appropriate, use these methods to enforce its consumer protection mandate.

Q. What role does the FTC have in monitoring and investigating advertising and marketing practices?

A. For decades the FTC has monitored and investigated the advertising and marketing practices of virtually all industries, including the cigarette industry. With respect to cigarette advertising, the FTC is additionally required by Congress to monitor and report back to Congress on cigarette companies' advertising and marketing practices. For example, Congress specifically required that the FTC annually transmit a report to Congress

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> concerning (A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate.

Federal Cigarette Labeling and Advertising Act, § 5(d)(2), Public Law 89-92, July 27, 1965 (JD-001371).

Q. What is included in these reports to Congress?

A. In these reports to Congress, the FTC provides detailed discussion and analysis of cigarette marketing and advertising practices, including discussion and analysis of "low tar"/"light" cigarette advertising campaigns, as you can see at page 10 of the Federal Trade Commission Report to Congress Pursuant to the Public Health Cigarette Smoking Act dated December 31, 1971 (JD-002061). The FTC often recommended, in these reports, that Congress pass legislation requiring tar and nicotine disclosures on cigarette packages. Federal Trade Commission Report to Congress Pursuant to the Public Health Cigarette Smoking Act, 1976, p. 7 (JD-002062).

Q. Are there other items regarding cigarettes that the FTC has written?

A. Yes. The FTC has also published in-depth reports and working papers reflecting the Commission's staff investigations and research regarding cigarette advertising, the testing for tar and nicotine, and the impact of FTC actions on cigarette companies and smokers.

Q. What does the FTC do to educate consumers and businesses?

A. The FTC engages in various activities to educate businesses regarding proper business practices and to educate/alert consumers regarding aspects of an industry that might potentially mislead or deceive consumers.

Q. Could you give us an example of how the FTC has educated consumers with respect to cigarettes?

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1 A. An example of the FTC's educating consumers is its issuance in May 2000 of the
2 "Consumer Alert" marked as JD-004380 entitled "Up in Smoke: The Truth about Tar and
3 Nicotine Ratings, " which warned about the meaningfulness of FTC tar and nicotine ratings,
4 because smokers may potentially "compensate" to get more tar and nicotine than the FTC's
5 ratings when smoking lower yield cigarettes.

6 **Q. Could you give us an example of how the FTC has educated businesses with respect**
7 **to cigarettes?**

8 A. Yes. For example, the FTC issued written guidance to potential cigarette manufacturers
9 and importers regarding federal warning label requirements on cigarette packages and in
10 advertising.

11 **Q. In what ways does the FTC cooperate with public and quasi-public agencies?**

12 A. The FTC works closely with both public and quasi-public agencies to monitor advertising
13 and marketing practices and to educate businesses regarding proper advertising and marketing
14 practices. With respect to public agencies, the FTC works with other federal agencies, as well as
15 state and local authorities, to enforce consumer protection laws and to ensure advertiser
16 compliance with rules and regulations. The FTC also cooperates with quasi-public agencies such
17 as the Better Business Bureau (BBB) and the National Advertising Review Board (NARB).

18 **Q. Can you give an example of how the BBB has been involved with the FTC?**

19 A. The BBB's National Advertising Division is involved in the regulation of advertising in
20 conjunction with the NARB, which provides guidance to advertisers.

21 **Q. What is the NARB's purpose?**

22 A. To sustain truth and accuracy in national advertising through self-regulation. It is part of
23 a two-tier system created by the advertising community in 1979 consisting of the National
24 Advertising Division of the Council of the Better Business Bureaus, Inc., or NAD; and the

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1 National Advertising Review Board, the NARB. The NAD is the investigative body, while the
2 NARB is the appeals body of the system.

3 **Q. Does the National Advertising Review Board interact with the FTC?**

4 A. Generally the National Advertising Review Board is able to obtain voluntary compliance
5 with its advertising guidelines, but on occasion will refer infractions to the FTC.

6 **Q. What actions will the National Advertising Review Board take if an advertiser does**
7 **not comply?**

8 A. NARB will refer an advertisement to the appropriate government agency, often the FTC,
9 if the company does not comply with NARB guidelines. The NARB states:

10 *NAD/NARB Procedures for Voluntary Self-Regulation of National Advertising*
11 require the NARB Chairman to refer the case to the appropriate government
12 agency when an advertiser does not agree to comply with NARB's ruling.

13 NARB Refers Winn-Dixie's Pricing Policy to FTC, http://www.bbb.com/advertising/nad/nad-
14 winn.html, viewed December 17, 1999 (emphasis in original) (JD-043599).

15 **Q. What other types of action has the FTC taken with regard to cigarette or other**
16 **advertisements?**

17 A. The FTC has screened or pre-screened ads when it believed such screening was
18 necessary, although I understand that it has recently stated that it no longer engages in this
19 practice. For example, following the adoption of the Cigarette Advertising Guides in the 1950s,
20 the FTC's Bureau of Consultation was in close contact with cigarette manufacturers and pre-
21 screened ads. In addition, the FTC also commonly would contact advertisers and have
22 advertisements pulled that the Commission found objectionable.

23 **Q. Has the FTC monitored broadcast and print advertising?**

24 A. FTC annual reports indicate that the Commission actively monitored both broadcast and
25 print advertising. For example, in fiscal year 1965, the FTC reviewed 897,609 advertisements,

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including 632,167 radio and television advertisements and 265,442 newspaper and magazine advertisements, as set forth at pages 13-14 of the 1965 Annual Report of the Federal Trade Commission (JD-003353).

Q. What has the FTC done regarding advisory opinions?

A. The FTC at times issues advisory opinions at the request of businesses regarding certain proposed advertising and marketing practices.

Q. Are the FTC advisory opinions publicly disclosed?

A. FTC advisory opinions are generally published.

Q. Dr. Langenfeld, you also mentioned advertising guides. Do you have an example of the FTC issuing advertising guides?

A. Yes, in 1955, the FTC issued Cigarette Advertising Guides that I will discuss in more detail later.

Q. What is the purpose of FTC guides in general?

A. According to the FTC, guides provide information to industries about what are acceptable claims and highlight what the FTC considers to be unacceptable practices. The FTC has stated:

> Guides serve two purposes: (1) they point out to the business community in specific language the legal boundaries of advertising claims; and (2) they put the spotlight of publicity on malpractices which both deceive the buying public and work competitive hardships on honest advertisers.

Annual Report of the Federal Trade Commission, 1959, p. 69 (JD-063264).

Q. Dr. Langenfeld, does the FTC use "voluntary" agreements with advertisers?

A. Yes, the FTC uses "voluntary" agreements to regulate what it considers unfair and deceptive advertising.

Q. What is "voluntary" about these agreements?

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1 A. Based on my research, "voluntary" agreements in general are not really voluntary in the
2 ordinary sense of the word. Rather, these agreements are usually reached under the threat of the
3 FTC taking legal action against a particular company or group of companies. The FTC has
4 stated, "[f]or those who fail to respond promptly to the Commission's voluntary compliance
5 program, the mandatory procedures are invoked." *Annual Report of the Federal Trade*
6 *Commission*, 1959, p. 69 (JD-063264). For example, the cigarette industry "voluntarily" agreed
7 to disclose tar and nicotine yields in advertisements, as measured by the FTC Method, under the
8 threat of formal FTC action to compel these disclosures. "FTC Suspends Proceeding to Require
9 Disclosure of Tar and Nicotine Content in Cigarette Advertising after Industry Amends
10 Voluntary Plan," *Federal Trade Commission News,* December 23, 1970 (JD-041337).

11 **Q. Can "voluntary" agreements be effective in changing industry advertising**
12 **practices?**

13 A. Yes. "Voluntary" agreements provide a vehicle by which the Commission can
14 effectively prevent what it perceives as potentially deceptive advertising across an entire
15 industry, which may be more efficient than obtaining compliance through individual consent
16 agreements or the promulgation of a trade regulation rule. See, for example, "FTC Directs
17 Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content," *Federal Trade*
18 *Commission News*, October 1, 1970 (JD-061533).

19 **Q. How does the FTC promulgate and use trade regulation rules?**

20 A. The FTC has the authority to promulgate trade regulation rules to regulate more widely
21 the conduct of an industry or group.

22 **Q. What happens if a trade regulation rule is violated?**

23 A. According to the FTC, a violation of a trade regulation rule is essentially considered a
24 violation of the law. The FTC has stated that "where a rule correctly expresses the requirements

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of the law, one who disobeys the rule is, for all practical purposes, disobeying the law." Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking And Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, p. 145 (JD-061508).

Q. Dr. Langenfeld, what steps does the FTC typically take in addressing what it has reason to believe to be deceptive or unfair practices?

A. The FTC follows a series of steps in implementing decisions in addressing deceptive or unfair practices. After FTC staff identifies a potentially deceptive or unfair practice, the staff may investigate through discovery from the company and retain third-party consultants to collect data (for example, conduct a survey of consumer interpretation of an advertisement). The FTC may instruct the responsible party in a way to correct the issue at hand, and companies typically comply with these instructions. If the responsible party does not make the appropriate changes, the Commission may issue a formal administrative complaint. At that time, the FTC and the companies may reach a formal agreement to end the practice. As the FTC states:

> If a consent agreement cannot be reached, the FTC may issue an administrative complaint or seek injunctive relief in the federal courts. The FTC's administrative complaints initiate a formal proceeding that is much like a federal court trial but before an administrative law judge: Evidence is submitted, testimony is heard, and witnesses are examined and cross-examined. If a law violation is found, a cease and desist order may be issued. Initial decisions by administrative law judges may be appealed to the full Commission.

Guide to the Federal Trade Commission, at 27, http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm, viewed on December 7, 2004 (JD-063647).

Often the FTC and firms under investigation agree to a formal consent order to cease the practice at issue. In some instances, the FTC and the firms engaging in the challenged practices will fully litigate the matter, including appeals to the federal circuit.

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After an order is final, any violations may result in civil actions by the FTC. The FTC publishes consent orders, which in turn provide guidance for other companies in the relevant industry.

Q. Do consent orders affect all companies within an industry?

A. Typically, yes. According to former FTC Chairman, Daniel Oliver, when using consent orders to regulate cigarette advertising,

> … it is entirely reasonable to suppose that one action against one cigarette company would have an affect on all of them, and that you would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers.

Testimony of Daniel Oliver (Former Chairman, FTC), *FTC Nicotine Program*, Hearing Before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, 100th Congress, 1st Session, May 7, 1987, p. 19 (JD-041796).

Q. Does the FTC investigate the implications of health claims for products?

A. Yes, the FTC often investigates claims regarding the health effects of a particular product. The FTC's long experience with the cigarette industry has given it unique expertise among federal agencies in evaluating health claims and other aspects of cigarette advertising and promotion, including the effects of particular marketing practices on consumer behavior.

Q. Has the FTC consulted with scientists when examining health claims that may reach consumers?

A. Yes. Since the truthfulness of health claims may not be readily apparent to consumers, the FTC's expertise and the expertise of those with specialized relevant experience may be needed to determine the validity of a specific health claim. The FTC does, therefore, often consult with experts and/or scientists to reach an opinion regarding the truthfulness of a

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1 particular claim. The Commission then determines what message consumers likely take away
2 from the claim, and whether the advertiser has adequately substantiated the claim given
3 consumers' perceptions. Support for this can be found in the FTC Policy Statement Regarding
4 Advertising Substantiation (JD-043531), the FTC Policy Statement on Deception, October 14,
5 1983 (JD-043526), and the deposition of the FTC's Deputy Director of the Bureau of Consumer
6 Protection, C. Lee Peeler, taken in this case on August 1, 2002 (Vol. III, pp. 842-844).

7 **Q. What other methods has the FTC used to determine consumers' beliefs in**
8 **advertising messages?**

9 A. Copy testing is one method used by the FTC to help it determine the message consumers
10 take away from a particular advertising claim, as Mr. Peeler discusses in his deposition taken in
11 this case on August 1, 2002 (Vol. III, pp. 842-844). Copy testing is a procedure where
12 individuals are asked questions regarding their perceptions of a particular advertising message.

13 For example, in an effort to evaluate the message consumers took away from *Premier*
14 cigarette advertisements, the FTC had a marketing expert evaluate internal R.J. Reynolds' copy
15 testing related to the *Premier* advertising campaign.

16 **V. <u>FTC ACTIONS RELATING TO CIGARETTE ADVERTISING 1940s -1960s</u>**

17 **Q. Dr. Langenfeld, let's move on to discuss the specifics of the FTC's interaction with**
18 **some of the defendants in this case. To what extent has the FTC analyzed cigarette**
19 **advertising in particular over time, and how does it view its expertise in this area?**

20 A. For many decades, the FTC has spent a significant amount of its resources analyzing
21 cigarette advertising. According to former FTC Chairman Paul Rand Dixon:

22 The number of Commission staff members engaged in the examination and
23 treatment of the issues arising from cigarette advertising and promotional
24 practices constitute, by far, the largest concentration of staff members devoted to
25 the activities of any industry within the Commission's Bureau of Deceptive

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> Practices, the organizational unit dealing with all such activities of a possibly false and misleading nature.

Correspondence from Paul Rand Dixon (Former Chairman, FTC) to John H. Banzhaf, III (Action on Smoking and Health, Executive Director), [Undated 1969], [FTCDOCS-0023-0465] – [FTCDOCS-0023-0467] (JD-003244).

As former FTC Chairman Daniel Oliver wrote to Congressman Bliley in 1986:

> The Commission has, over several decades, documented the scale and nature of cigarette advertising, monitored the scientific basis for tar and nicotine claims, and produced numerous scholarly reports on cigarette advertising and the tobacco industry – in addition to bringing dozens of health-related deception cases against all the major companies. It is fair to say, I believe, that the Commission's expertise in this area is unique.

Correspondence from Daniel Oliver (Former Chairman, FTC) to Congressman Thomas J. Bliley, Jr., *Advertising of Tobacco Products*, August 1, 1986 (JD-004281).

Q. Do you believe FTC actions have had a substantial impact on the conduct of companies in advertising cigarettes?

A. Yes. The FTC's actions have had a substantial impact on cigarette advertising, as confirmed by FTC sponsored studies examining the impact of the FTC on cigarette advertising content, as shown in *Cigarette Advertising, Health Information and Regulation Before 1970*, Bureau of Economics, Federal Trade Commission, Working Paper No. 134, at 25-27, December 1985, by Dr. John E. Calfee (JD-000435).

Q. For how long has the FTC been involved with the advertising and marketing practices of cigarette manufacturers?

A. The FTC has been actively involved in controlling the advertising and marketing practices of the cigarette manufacturers since the 1940s, and the cigarette manufacturers have either complied or been forced to comply with the FTC's policies. The FTC brought a series of

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1 formal actions against each of the major cigarette manufacturers during the 1940s and 1950s, and
2 has continued to control the type of cigarette advertising to the present day.

3 **Q. Can FTC enforcement have an effect on a company's value?**

4 A. Yes. In addition to having a direct effect on a company's actions, FTC enforcement
5 actions in general can affect a company's value. Economic research shows that public disclosure
6 of an FTC complaint, whether the FTC wins a case or not, can have a significant negative effect
7 on a company, as shown in the "Regulation of Advertising: Capital Market Effects," Bureau of
8 Economics Staff Report to the Federal Trade Commission, April 1988, by Alan Mathios and
9 Mark Plummer (JD-043544) and "The Effects of FTC Advertising Regulation," *The Journal of*
10 *Law and Economics*, vol. 24, no. 3, December 1981, pp. 403-448, by Sam Peltzman (JD-
11 043511). These studies find that the issuance of an FTC complaint will potentially affect the
12 future profits of the company subject to the complaint. Companies, therefore, have a strong
13 incentive not to engage in behavior that could trigger FTC action.

14 **A. <u>Individual Cases – 1940s-1950s</u>**

15 **Q. Dr. Langenfeld, did the FTC bring initial cases regarding cigarette advertising in**
16 **the 1940s and early 1950s?**

17 A. Yes. In these cases, the FTC alleged that the cigarette companies were engaging in unfair
18 and deceptive advertising.

19 **Q. We will discuss the cases individually, but what was the overall result of these cases?**

20 A. These cases involved what the FTC alleged were unfair and deceptive health claims,
21 usually because the FTC found the claims unsubstantiated. The cases took some time to bring to
22 their final conclusions, but the FTC prevailed in each of these matters and all of the cigarette
23 companies were put on notice that the FTC would in all likelihood win these types of cases.

24 **Q. What effect did FTC actions have on cigarette manufacturers during this time?**

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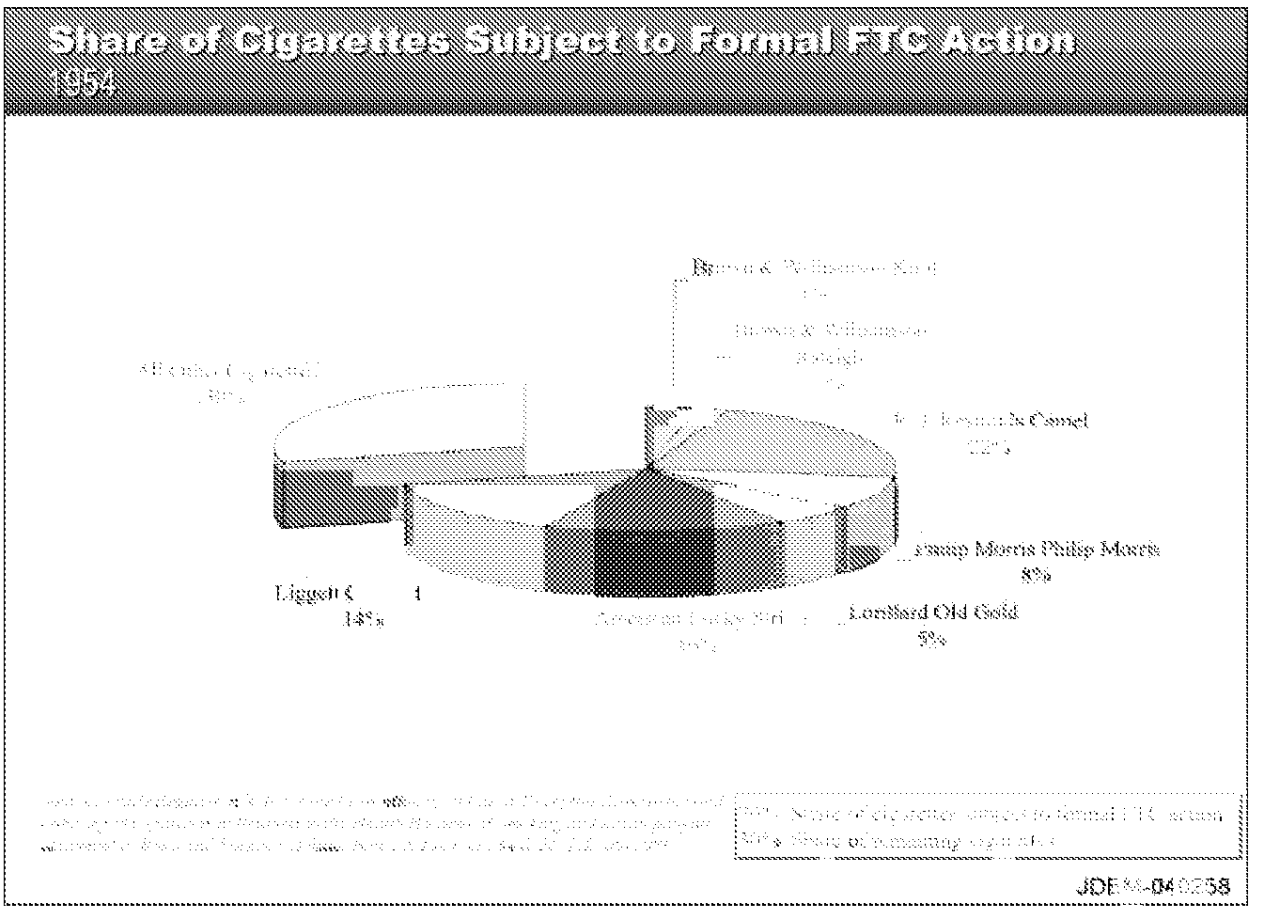
A. All the major cigarette manufacturers were directly affected by FTC formal actions during this time. Although the consent agreements typically covered single brands, these brands accounted for the vast majority of cigarettes sold. Cigarette brands directly affected by FTC formal actions during this period made up roughly 70 percent of the cigarettes sold in the U.S. in 1954. Moreover, companies subject to these consents or other compliance agreements with the FTC sold virtually all cigarettes in the U.S. in 1954.

Q. Dr. Langenfeld, have you prepared a graphic showing what share of the cigarette market was subject to formal FTC action as of 1954?

A. Yes, I have.



Q. Could you please describe that chart for us?

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1 A. You can see from this chart that the brands involved in the consents accounted for almost
2 three-quarters of all cigarettes sold in the U.S. in 1954.

3 The outcomes in these cases together formed the basis of the FTC's policy and
4 enforcement to prevent what the FTC believed to be deceptive and unfair cigarette
5 advertisements, and created the foundation for the content of FTC's Cigarette Advertising
6 Guides that were designed to prevent similar claims for any cigarette, as I discuss later.

7 **Q. Let's discuss some of these cases to illustrate the FTC's enforcement actions for the**
8 **Court. Do you recall a 1947 case involving B&W and Raleigh cigarettes?**

9 A. Yes. This case involved an ad for Raleigh that stated: "Right for taste, and right for
10 throat!" Brown & Williamson, File No. 1-20052 (May 27, 1947) (JD-043371). The FTC took
11 the claim to mean "[t]hat Raleigh cigarettes have been adapted to or made suitable for the throat
12 so that the smoke from such cigarettes is beneficial to the throat or is less harmful to the throat
13 than the smoke of other cigarettes." The claim was found unfair and deceptive. *See In the*
14 *Matter of Brown & Williamson Tobacco Corp.,* File No. 1-20052 (May 27, 1947) (JD-043371).

15 **Q. What was the outcome of this case involving Raleigh?**

16 A. B&W agreed to cease this claim.

17 **Q. Do you recall a case involving R.J. Reynolds and its Camel cigarettes in the 1940s?**

18 A. Yes. The FTC brought a complaint challenging several claims made in Camel ads,
19 including that Camel cigarettes:

20 a. are good for and help digestion in a variety of ways;

21 b. give a lift in energy;

22 c. will not impair wind and physical condition of athletes, no matter how
23 many Camels are smoked;

24 d. never harm or irritate the throat

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e. are soothing on the nerves and are different in this respect from other cigarettes;

f. contain 28% less nicotine than the 4 other largest selling brands.

See In the Matter of R. J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950) (JD-61525).

Q. What was the outcome of this case?

A. Relying on a record consisting largely of expert testimony and documentary evidence, the FTC found all claims, express or implied, false and misleading, as follows:

a. All of the health claims imply that Camel cigarettes are beneficial or not injurious to a particular bodily system or some part of the body. The claims were general and made alike to all persons regardless of their physical condition or the quantity of cigarettes they smoked. However, Camel cigarettes are harmful if smoked to excess and when the smoker is diseased. The broad claims of Camel that apply to all smokers were therefore deceptive and misleading;

b. The scientific evidence showed that Camel cigarettes were not an aid to digestion and in fact may harm digestion;

c. Ads that Camel "renews and restores bodily energy"; "creates and activates the extra energy needed" imply that Camel creates energy. The scientific evidence shows that the effect of smoking on blood sugar levels varies across smokers, so a universal claim is misleading. Further, what effect on energy a rise in blood sugar (even if due to smoking) had on energy is open to scientific conjecture. Hence the claims were false and misleading;

d. Athletes and others are harmed by excessive smoking, so the claim that Camel will not harm athletes no matter how much is smoked is false and misleading;

e. The claim that Camel's will never irritate the throat was not limited to moderate smokers or those in good health, and so was deceptive and misleading. Further, cigarettes contain throat irritants. The smoke from Camel contains all the irritating substances in about the same degree as the smoke from 5 of the other leading brands; so Camel is no less irritating than the other brands. The smoke from all brands "will irritate disordered throats, and excessive smoking of Camels or any other brand of cigarettes, will irritate even throats in normal health condition." The claim was false and misleading.

f. The claim that Camel is soothing to the nerves is false and misleading, since the effect on nerves will vary across smokers. Excess smoking will

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not be soothing, restful or comforting. All cigarettes are the same in this respect.

g. Camel used essentially the same tobaccos as other companies, so nicotine content almost necessarily had to be the same. Also, the nicotine content of Camel cigarettes varies across Camel cigarettes and the differences between individual Camel cigarettes and the cigarettes of other brands also varied. Camel did not prove that the nicotine content of its cigarettes were consistently and uniformly below the nicotine of the 4 competing brands compared with Camel. The FTC concluded that the nicotine content of Camel was not below the nicotine content of the comparison brands, so the claim for Camel was false and misleading.

See In the Matter of R. J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950) (JD-061525).

Q. What did the FTC rely upon in reaching this decision?

A. In reaching this decision, the FTC relied on tests conducted by the FDA on request by the FTC. The test results showed that the nicotine content of the tobacco in and smoke from individual cigarettes varied greatly across brands and across cigarettes of the same brand. The FTC found these differences precluded a statement that Camel has less nicotine than other brands. The FDA tests did show that on average Camel had more nicotine than the average for the comparison brands, and this also was taken to show that the claim for Camel was false and misleading. *See In the Matter of R. J. Reynolds Tobacco Co.,* 46 F.T.C. 706 (1950) (JD-061525).

Q. Did Reynolds appeal this decision?

A. Yes, Reynolds appealed the decision.

Q. What was the outcome of the appeal?

A. The Court of Appeals supported all of the FTC's findings on health claims. Reynolds was forced to comply with the FTC's actions.

Q. Who did the next case involve?

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A. P. Lorillard Company. The FTC's complaint alleged that Lorillard's claims that Old Gold cigarettes were lowest in nicotine and throat irritating tars and resins when compared with 6 other leading brands were health claims and were not substantiated. The comparison was based on figures reported by Reader's Digest in July 1942. *See In the Matter of P. Lorillard Co.,* 46 F.T.C. 735 (1950) (JD-061526).

Q. What was the outcome of this case involving Lorillard's Old Gold cigarettes?

A. The FTC found the claim false and misleading, concluding:

> a. Lorillard buys the same tobaccos and processes tobacco in the same way as the other companies. The nicotine content of its cigarettes cannot as a practical matter differ from other brands.
>
> Also, according to FDA tests, the nicotine in the tobacco and smoke of Old Gold cigarettes varied across Old Gold cigarettes and when individual Old Gold cigarettes are compared with the cigarettes of other brands. These variations preclude statements that Old Gold is lower in nicotine than other brands.
>
> b. The reliance on Reader's Digest was misleading. Left out of the ad was reference to the qualifying statement in the Reader's Digest article that: "[t]he laboratory's general conclusion will be sad news for the advertising copy writers, but good news for the smoker, who need no longer worry as to which cigarette can most effectively nail down his coffin.... Says the laboratory report: 'The differences between brands are, practically speaking, small, and no single brand is so superior to its competitors as to justify its selection on the ground that it is less harmful.'"

According to the FTC, expert testimony indicated that the difference in average nicotine and tar between Old Gold and each of the other brands tested was "insignificant from a physiological standpoint." Reliance on the ad was false and deceptive. *See In the Matter of P. Lorillard Co.,* 46 F.T.C. 735 (1950) (JD-061526).

Q. Did Lorillard appeal this decision?

A. Yes, Lorillard appealed the FTC's decision.

Q. What was the outcome of the appeal and subsequent developments?

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A. The Court of Appeals upheld all substantive parts of the FTC's decision. *See P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950) (JD-061526). In 1958, Lorillard advertised that Old Gold contain less nicotine and tar and is less irritating to the throat than other leading brands. The FTC sued Lorillard in 1958 for violating its 1950 order. The Court of Appeals agreed with the FTC, and Lorillard was forced to comply with the FTC's action. *See* F.T.C., Statutes and Court Decisions, 1956-1960, pp. 490-492 (JD-011255).

Q. Please describe the next FTC case against a major cigarette company.

A. This complaint alleged Lucky Strikes advertisements were making several unsubstantiated health claims:

a. "are less acid than other popular brands";

b. are less irritating to the throat than competing brands;

c. provide protection against throat irritation and coughing;

d. "contain less nicotine than do competing brands";

e. have removed certain throat irritants from the tobacco.

In the Matter of American Tobacco Co., 47 F.T.C. 1393 (1951).

Q. What was the outcome of this case?

A. The FTC found that each claim was false and misleading, concluding:

a. Scientific evidence showed no difference in the "acid" of the tobacco or smoke of Luckies v. other brands. Also, Luckies did not use different tobaccos on average, so a difference in acid would not be expected.

b. Concerning claims of less irritation and coughing, the evidence consisted of testimony of doctors, chemists, professors, and others who had engaged in research on tobacco and cigarette smoke. The FTC found that the tobacco used in Luckies contained irritants. The FTC also found no significant differences in the amounts of tar, resins, or nicotine among leading brands. All leading brands contained irritants, and any differences in the chemical constituents of the different brands were so slight that the smoke of one brand was no less irritating than the smoke of other leading brands. The smoke from Luckies therefore was not "easy on one's throat" and Luckies provided no protection against throat irritation or coughing.

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c. Nicotine was found to be a harmful constituent. Evidence was presented on the nicotine content of different tobaccos, different cigarette brands, and whether the measured differences were significant pharmacologically or physiologically.

d. The FTC concluded that tobacco was purchased at auction and all of the companies bought in the same way and the same tobaccos. It was impossible to tell whether the tobacco used in Luckies differed in nicotine content from the tobacco purchased by other companies.

e. In manufacturing, it was not possible to maintain a constancy of nicotine across cigarettes, so Luckies could not claim the nicotine in its cigarettes to be lower than other brands.

f. In tests presented by both sides, the nicotine content of Luckies was shown to vary across individual Lucky cigarettes and compared with other brands. Experts testified that the differences across cigarettes or brands were too small to have any significant effect on the smoker: "[T]here would be no difference in the effect on the human body as a result of the slight differences in the nicotine in the smoke of the different leading brands of cigarettes."

g. Luckies did not completely remove any particular irritant in the tobacco used to make Luckies, so it could not claim that Luckies were "easier" on the throat on the ground that Luckies might have less of a particular irritant.

See In the Matter of American Tobacco Co., 47 F.T.C. 1393 (1951).

Q. Was the decision appealed?

A. The decision was appealed and the Court of Appeals upheld the FTC on all substantive issues. *See In the Matter of American Tobacco Co.,* 48 F.T.C. 1161 (1952).

Q. Who did the next major case involve?

A. Philip Morris. The complaint challenged several claims in Philip Morris advertisements:

a. do not cause throat irritation or "smoker's cough";

b. the irritants in the smoke of 4 other leading brands averaged more than 3 times the irritants in Philip Morris;

c. the irritant effect of the 4 other leading brands lasted 5 times longer than for Philip Morris.

See In the Matter of Philip Morris & Co., Ltd., 49 F.T.C. 703 (1952) (JD-043375).

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Q. What were the issues that the FTC analyzed ?

A. The Commission studied evidence based on Philip Morris' animal and other testing and rejected these tests specifically. Philip Morris used a different moistener than did other producers: diethylene glycol instead of glycerine. Philip Morris argued that diethylene glycol caused less throat irritation than other brands. Philip Morris provided a variety of tests to substantiate its claims. In particular, Philip Morris presented evidence from various tests to show that diethylene glycol was less irritating. The tests involved animal experiments with rabbits to see if Philip Morris caused less eye irritation. Also, inhalation tests were done with animals to test differences in irritation to throat tissue of the different humectants. Human experiments also were done to see if smoking Philip Morris caused less throat irritation measured by throat redness or other signs of irritation.

The FTC challenged the tests' accuracy and relied on testimony and tests of its own expert witnesses, including tests done by the glycerine producers, which showed no differences in irritation according to the humectant used.

Interestingly, the Commission found that animal experiments on which Philip Morris relied may not apply to humans:

> In order for the Commission to apply the claimed results of this test to the question before it, it would have to find (1) that the response of the human upper respiratory tract to the various smokes was in some fashion proportional to the response of the rabbit's nictitating membrane, and (2) that the difference in this proportionate response is significant. The Commission does not so find.

In the Matter of Philip Morris & Co., Ltd., 49 F.T.C. 703 (1952) (JD-043375).

The FTC found tests of the color of the throat after smoking different cigarettes were unreliable. The FTC concluded that all cigarettes are irritating, and the extent of irritation depends importantly on the individual smoker. The FTC concluded that Philip Morris cigarettes were irritating, and there was no significant difference in irritation between Philip Morris

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1 cigarettes and other leading brands. The FTC also found that the Philip Morris humectant was
2 not significantly different from glycerine, and Philip Morris cigarettes did not protect the smoker
3 from cough or irritation. *See In the Matter of Philip Morris & Co., Ltd.,* 49 F.T.C. 703 (1952)
4 (JD-043375).

5 **Q. What was the outcome of this case?**

6 A. Philip Morris appealed this decision. One difference between this appeal and the others
7 is that the FTC tried to enjoin Philip Morris from continuing its ads pending the outcome of the
8 appeal. The Court rejected this and the case was remanded to the FTC in August 1953.

9 On remand, the FTC reconsidered its decision and concluded that the record did not
10 provide an adequate basis to decide whether Philip Morris cigarettes were less irritating to the
11 throat than other cigarettes. The case was then sent to the examiner for additional evidence.

12 Before the proceeding started again, Philip Morris asked the Commission to dismiss the
13 complaint. In support, it presented an affidavit of the President of Philip Morris stating that the
14 complaint and further proceedings were unnecessary because Philip Morris had abandoned ads
15 that its cigarettes were less irritating than other leading brands and the use of diethylene glycol.
16 Philip Morris also stated that it had no intention of resuming these ads, or to again use diethylene
17 glycol. The FTC accepted these assurances and dismissed the complaint. *See In the Matter of*
18 *Philip Morris & Co., Ltd.,* (JD-043378).

19 **Q. What cigarette company was involved in the next case you found in your**
20 **investigation?**

21 A. Liggett & Myers. The case against Liggett started as an effort by the FTC to enjoin
22 Liggett's health claims while the case was being tried. This would avoid potentially lengthy
23 proceedings (as in the earlier cases) during which the challenged health claims could continue.

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The claim challenged was that "Chesterfield cigarettes can be smoked by any smoker without inducing any adverse effect upon the nose, throat and accessory organs of the smoker." *FTC v. Liggett & Myers Tobacco Co.,* 108 F. Supp. 573, 576 (1952) (JD-004016).

Q. What was the outcome of this case?

A. The FTC initially sought to define cigarettes as a "drug." The FTC argued that if it were defined so, this would allow the FTC to stop Liggett's ads under Secs. 12 and 13 of the FTC Act while the FTC's proceedings were ongoing. The FTC stated that Liggett claimed "that Chesterfield cigarettes are manufactured in such a manner as to prevent irritation of the nose, throat and accessory organs of smokers," and so the product is a drug. The FTC also argued that product was intended to "effect the functions of the body of man," again consistent with a drug. *FTC v. Liggett & Myers Tobacco Co.,* 108 F. Supp. 573, 574 (1952) (JD-004016).

The District Court did not support the FTC's allegation that cigarettes should be considered a drug: "The legislative history, such as it is, ... leads me to the conclusion that Congress, had the matter been considered, would not have intended cigarettes to be included as an article 'intended to affect the functions of the body of man' or in any other definition of 'drug'." *FTC v. Liggett & Myers Tobacco Co.,* 108 F. Supp. 573, 577 (1952) (JD-004016). The Court of Appeals agreed with this interpretation. *See FTC v. Liggett & Myers Tobacco Co.,* 203 F.2d 955 (2d Cir. 1953).

Failing to get an injunction, the FTC issued an administrative complaint against Liggett in 1953, citing as unsubstantiated health claims that

a. "nose, throat, and accessory organs not adversely affected by smoking Chesterfields. First such report ever published about any cigarette."

b. "Buy Chesterfield -- Much Milder"; "Always Milder"

c. "Chesterfield uses only the ingredients proved by scientific tests to produce a soothing and relaxing smoke"

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In the Matter of Liggett & Myers Tobacco Co., 55 F.T.C. 354 (1958) (JD-043385).

The FTC found the claims illegal. Liggett presented a study by A.D. Little showing that a group of A.D. Little employees asked to smoke Chesterfield showed no adverse effects on nose, throat, etc. from smoking Chesterfield (compared with pre test conditions).

The Commission rejected the study. To the FTC, the claim that Chesterfields were milder was taken as a claim that Chesterfield was less irritating than other cigarettes. FTC witnesses (doctors and scientists) testified that cigarette smoking is irritating, and tests showed that Chesterfield had no less tar/nicotine than other leading brands and therefore were not less irritating.

The FTC found Liggett did not prove that Chesterfield were less irritating, since all cigarettes are irritants, and Chesterfield were no less irritating than other leading brands. Also, doctors testified for the FTC that from their experience, different brands of cigarettes had no effect on the degree of irritation they observed.

The FTC took the claim that Chesterfield produced a smooth and relaxing smoke to mean that Chesterfield "will soothe and relax the nerves of smokers, irrespective of the physical condition or the smoking habits of smokers." The FTC assumed the ad was directed to all smokers. To the FTC, the ads were illegal because cigarettes will not soothe and relax the nerves of all smokers:

> [The ad fails] to give recognition to the fact that the effect upon an individual of a given amount of cigarette smoke depends in a large measure upon the degrees of physical normalcy, sensitivity and tolerance of the individual, variances which exist in all persons to a greater or lesser extent.

In the Matter of Liggett & Myers Tobacco Co., 55 F.T.C. 354 (1958) (footnote omitted) (JD-043385).

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1 In effect, the FTC again challenged health claims based on its view that the ads were not
2 sufficiently substantiated.

3 **Q. What was the outcome of this case?**

4 A. Liggett did not appeal the FTC decision, and complied with the FTC's order.

5 **Q. Did the FTC take action in 1954 involving Lorillard?**

6 A. Yes. In March 1954, the FTC forced Lorillard to make changes to its Kent advertising.
7 Specifically, the FTC forced Lorillard to remove, among other things, proof of greater health
8 protection claims, without having to resort to litigation.

9 **Q. What effect did the early FTC cases have on advertising campaigns?**

10 A. All of the early cases brought by the FTC against the cigarette companies forced the
11 cigarette companies to discontinue specific advertising campaigns that the FTC considered false
12 and misleading. These cases reflected the FTC's strict requirements for substantiation of health
13 claims for cigarettes. The cases eventually covered the vast majority of cigarettes sold, even
14 though the FTC was not able to obtain an injunction against Liggett by arguing cigarettes were a
15 drug.

16 **Q. Dr. Langenfeld, aside from FTC actions, did other events of the early 1950s affect**
17 **cigarette advertising?**

18 A. Yes. The 1953 dissemination of information regarding the potential health effects of
19 smoking likely caused a reduction in per capita cigarette consumption primarily due to a decline
20 in "smoking intensity," according to the 1979 FTC *Staff Report on Consumer Responses to*
21 *Cigarette Health Information. See* Ippolito, Richard A., R. Dennis Murphy, and Donald Sant,
22 *Staff Report on Consumer Responses to Cigarette Health Information*, Federal Trade
23 Commission, August 1979, pp. 6, 9 (JD-040742).

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During this period, the cigarette companies not only faced increased pressure to discontinue health claim advertising from the FTC, but from others as well. Public health groups and business associations followed the FTC's lead in urging the cigarette companies to reduce what the FTC believed to be false or misleading health claims, and the cigarette companies began eliminating these types of claims.

Q. Could you provide an example of how cigarette advertising began to change in the early 1950s in direct response to FTC actions?

A. During the year following the court of appeals decision against RJR in November 1951, health claims began to diminish. The FTC had taken actions to eliminate what it believes to be health claims, and effectively obtained compliance from at least one major cigarette company at this time. R.J. Reynolds even went beyond the specific FTC compliance requirements outlined in its order.

B. <u>Better Business Bureau Precursor to Cigarette Advertising Guides</u>

Q. Was the Better Business Bureau involved with cigarette advertising?

A. Yes. In December 1953, the Better Business Bureau issued cigarette advertising standards. These standards were "'based primarily on findings of the Federal Trade Commission in support of cease and desist orders which it has issued in the past against some leading cigaret advertisers.'" Cigaret Makers Urged to Purge Medical Claims, *Advertising Age*, December 21, 1953, pp. 3, 46 (JD-043377). These standards provided as follows:

> 1. Proof of claims: Cigaret advertisers should be prepared and willing to submit, upon request, scientific test data or other competent proof in support of any allegedly factual claim appearing in advertising submitted for publication.
>
> 2. Claims that cigaret smoking is beneficial: Cigaret advertising should not claim, directly or by implication, that cigarette smoking is beneficial to health or, under any condition, is physiologically beneficial to any of the bodily systems.

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3. Claims that cigaret smoking is not harmful: Cigaret advertising should not claim, directly or by implication, or without qualification as to the individual smoker and the extent to which he smokes, that cigaret smoking cannot or will not cause harmful effects.

4. Claims for elimination of harmful substances: If it is claimed that, by virtue of its ingredients, method of manufacture, length, added filter, or for any other reason, the smoke of a given brand of cigaret contains less nicotine, tar, resins or other irritating or harmful substance, such representation should be supported by impartial scientific test data which conclusively prove that the claimed difference does, in fact, exist to a significant degree.

5. Claims that a brand is less harmful: If it is claimed that, by virtue of its ingredients, method of manufacture, length, added filter, or for any other reason, smoking a given brand of cigaret is less harmful to the respiratory organs or any bodily system, such claims should be based on impartial clinical test data or other competent proof and should exist to a physiologically significant degree.

6. Testimonials: Testimonials used in cigaret advertising should: (a) be genuine; (b) represent the honest and sincere opinion of the author; (c) be competent, e.g., while any smoker is competent to express a preference for a brand, specialized training is essential to pass judgment on the physiological effects of smoking; (d) contain no misstatement of fact or misleading implication; (e) reflect the current opinion of the author; (f) be in accord with generally accepted scientific knowledge if it purports to set forth scientific fact. Any advertised portion of a testimonial should fairly reflect the spirit and content of the complete testimonial.

7. Comparative sales: If any claims are made in advertising as to the comparative sales of competitive brands, either nationally, locally, or by individual vendors, they should be based upon verified current sales figures and such data should be made available to media upon request.

8. Attacks upon competition: Cigarets should be sold on their merits without disparagement of competitive manufacturers, their products, or methods of doing business.

Cigaret Makers Urged to Purge Medical Claims, *Advertising Age*, December 21, 1953, pp. 3, 46 (JD-043377).

Q. Were these BBB standards related to the subsequent FTC Cigarette Guides?

A. Yes. The Better Business Bureau standards were not only a reflection of past FTC cases, but foreshadowed the FTC Cigarette Advertising Guides that were circulated in draft form in

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September 1954, as discussed later in my testimony. The BBB Standards contained most of the substantive restrictions contained in the subsequent FTC Guides.

C. 1955 FTC Cigarette Advertising Guides

Q. Dr. Langenfeld, what did the FTC do in 1955 to regulate cigarette advertising on a more comprehensive basis rather than the case-by-case approach we have been discussing?

A. At that time, the FTC issued Cigarette Advertising Guides.

Q. What were the Guides based on?

A. According to the FTC, the Guides were based on the precedents established by the FTC's earlier cases against the individual cigarette companies:

> The guides are based upon case law involving cigarette advertising and upon other basic concepts of law in areas where experience indicates additional and material deception and unfair practices are likely to occur.

Correspondence from Charles E. Grandey, Bureau of Consultation, Director to Commissioner Mead, March 28, 1955, [FTCDOCS-0122-0261] – [FTCDOCS-0122-0262] (JD-063247).

Q. What did the Guides say?

A. The Guides read as follows:

> No representation, claim, illustration, or combination thereof, should be made or used which directly or indirectly:
>
> 1. Refers to either the presence or absence of any physical effect or effects of cigarette smoking in general or the smoking of any brand of cigarette. NOTE: Words, including those relating to filters or filtration, which imply the presence or absence of any physical effect or effects are considered subject to this guide.
>
> 2. Represents that any brand of cigarette or the smoke therefrom is low in nicotine or tars, or contains less nicotine, tars, acids, resins, or other substances, by virtue of its ingredients, method of manufacture, length, added filter, or for any other reason or without any assigned reason, than any other brand or brands of cigarettes when it has not been established by competent scientific proof applicable at the time of dissemination that the claim is true, and if true, that such difference or differences are significant. NOTE: Words, including those

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relating to filtration, which imply lesser substances in the smoke, through filter comparisons or otherwise, are considered subject to this guide.

3. Refers to the effect or effects of cigarette smoking in general or the smoking of any brand of cigarette on the (a) nose, throat, larynx or other part of the respiratory tract, (b) digestive system, (c) nerves, (d) any other part of the body, or (e) energy.

4. Represents medical approval of cigarette smoking in general or the smoking of any brand of cigarette.

5. Compares the volume of sales of competitive brands of cigarettes, or the purchase or use of particular types, qualities or grades of tobacco in cigarettes, when such claim is not based on reliable information currently applicable when disseminated.

6. Relates to or contains testimonials respecting cigarette smoking or the smoking of any brand of cigarette unless (a) the testimonial is genuine, (b) the advertiser has good reason to believe it represents the current opinion of the author who currently smokes the brand named, and (c) it contains nothing violative of any of the other guides set forth herein.

7. Falsely or misleadingly disparages other cigarette manufacturers or their products.

NOTES:

(a) Nothing contained in these guides is intended to prohibit the use of any representation, claim or illustration relating solely to taste, flavor, aroma, or enjoyment.

(b) Nothing contained in these guides will have the effect of modifying the provisions of any existing cease and desist order or stipulation or altering the responsibility of any party thereto to fully comply with the specific provisions of such order or stipulation affecting it. They do not constitute a finding in and will not necessarily affect the disposition of any formal or informal matter now pending with the Commission.

(c) These guides will be altered, modified, or otherwise amended when and if the facts and circumstances warrant.

FTC Press Release, September 22, 1955 (JD-063250).

Q. Was there an initial draft of the Guides?

A. Yes, in September 1954, and they were publicly circulated, as set forth in The FTC Cigaret Ad Code, *Advertising Age*, September 20, 1954 (JD-063241); FTC Takes Major Step in

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First Bid to Curb Ad Claims with Industry Code, pp. 2, 40, *Advertising Age*, September 20, 1954 (JD-063242); and FTC Suggestions for Cigaret Ads, p. 40, *Advertising Age*, September 20, 1954 (JD-063243).

Q. Were the final Guides any different than the initial draft?

A. The final version of the Guides, issued in September 1955, was slightly different than the initial draft, but not in any economically significant way.

Q. What importance do you place on the September 1954 circulation of the draft Guides?

A. The draft Guides, similar to the BBB's Advertising Standard of December 1953, put the cigarette companies on notice that the FTC policy was to eliminate health claims in cigarette ads.

Q. Why did the FTC develop the Cigarette Advertising Guides?

The evidence indicates that the FTC wanted to provide broader guidance regarding what would or would not be acceptable advertising content.

Q. How did the cigarette companies respond to the draft Guides?

A. The cigarette companies provided different responses regarding their willingness to follow the final draft guides circulated in June 1955. Major cigarette manufacturers accounting for over 90% of the U.S. market, acknowledged that they would not violate the Guides.

Q. What immediate impact did the Guides have on cigarette advertising?

A. The Cigarette Advertising Guides had a substantial impact on the content of cigarette advertising. Even before the Guides were formally adopted, the cigarette companies started revising their advertising in response to FTC actions. At the FTC's request, the cigarette companies stopped many health claims in ads before the Guides were formally adopted.

Q. Did the Guides affect the content of cigarette advertisements?

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1 A. Yes. In a 1985 study, FTC economist Dr. John Calfee found that the Cigarette
2 Advertising Guides significantly reduced the amount of health claims in cigarette
3 advertisements. *See* Calfee, John E., *Cigarette Advertising, Health Information and Regulation*
4 *Before 1970*, Bureau of Economics, Federal Trade Commission, Working Paper No. 134,
5 December 1985, p. 26 (JD-000435).

6 The cigarette companies' responses to the FTC's Cigarette Advertising Guides is
7 consistent with the FTC's implementation of the Guides having a significant effect on health
8 claims in cigarette advertisements.

9 **D. <u>1957-1959 The FTC and the "Tar Derby"</u>**

10 **Q. Dr. Langenfeld, you have mentioned that the FTC listened to the scientific**
11 **community when appropriate, correct?**

12 A. That is correct.

13 **Q. What were scientists saying about tar in the mid to late 1950s?**

14 A. By 1957, some scientists were advocating a reduction of tar in cigarette smoke. Famed
15 researcher Dr. Ernst Wynder, in particular, advocated a 40 percent reduction in tar levels,
16 indicating that such a reduction would result in somewhat "safer" cigarettes. "This is the
17 direction in which I believe the filter industry should go…. I would never say that this cigarette
18 would be safe, but I would say it will be safer." Testimony of Ernst L. Wynder, *False and*
19 *Misleading Advertising (Filter-Tip Cigarettes)*, Hearings Before a Subcommittee of the
20 Committee on Government Operations, House of Representatives, 85th Congress, 1st Session,
21 July 18-19 and 23-26, 1957, pp. 108-109 (JD-000332).

22 **Q. Do you have any reason to believe the FTC was aware of such opinions?**

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1 A. Yes, in the 1950s the FTC directly solicited Dr. Wynder's opinions regarding low tar
2 issues. *See* Memorandum to File from John P. Sullivan (Bureau of Consultation, FTC) August
3 28, 1958 [FTCDOCS-0125-0051] – [FTCDOCS-0125-0053] (JD-040159).

4 **Q. What happened to tar levels during this time?**

5 A. There was intense competition among the major cigarette manufacturers to reduce tar
6 levels during this time, colloquially known as the "tar derby." Many advertisements focused on
7 improved filtration and decreased tar. During this period sales-weighted-average tar levels of
8 cigarettes dropped dramatically.

9 **Q. How were tar levels measured at this time?**

10 A. Cigarette companies used a variety of testing labs to measure the tar yields in their
11 products in the 1950s. In addition, two major independent publications at the time, Reader's
12 Digest and Consumer Reports, reported the relative tar levels of the leading cigarette brands
13 based on independent testing labs. The FTC monitored these developments and collected tar
14 yield data. The FTC expressed concern that there was no standard method of measuring tar and
15 nicotine yields in cigarette smoke. *See* "FTC Seeks Uniform Testing of Cigarette Smoke,"
16 *Federal Trade Commission Press Release*, February 16, 1958, [FTCDOCS0122-0389] (JD-
17 061903).

18 **Q. Did the FTC implement its own test method at this time?**

19 A. The FTC brought together representatives from various cigarette testing laboratories and
20 cigarette manufacturers in an effort to develop and adopt a standardized testing method. *See*
21 "FTC Seeks Uniform Testing of Cigarette Smoke," *Federal Trade Commission Press Release*,
22 February 16, 1958, [FTCDOCS0122-0389] (JD-061903). The FTC, however, did not adopt a
23 standardized test method at that time.

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1 **Q. Did the FTC take action related to tar and nicotine advertisements at or about this**
2 **time?**
3 A. Yes. In 1959, the FTC filed a complaint against Brown & Williamson for making what
4 the FTC believed were false and misleading tar and nicotine claims for *Life* cigarettes. In the
5 consent order entered in 1960, the FTC barred Brown & Williamson from advertising that the
6 filter used in *Life* cigarettes absorbs more "tar" or nicotine than the filters of other cigarettes, that
7 *Life* cigarettes are approved by the U.S. government, and that the U.S. government has found that
8 *Life* cigarettes are lower in "tar" or nicotine compared with other filter cigarettes
9 **Q. What happened to *Life*'s market share as a result of the FTC's action?**
10 A. The impact of the FTC's action appears to have been immediate and substantial.
11 Following the FTC's action against Brown & Williamson and Brown & Williamson's
12 compliance, the sales of *Life* fell by over 56 percent between 1959 and 1960.
13 **Q. After the Brown & Williamson case, what action did the FTC take next with respect**
14 **to tar and nicotine claims?**
15 A. Given that no standardized method for measuring tar and nicotine had been developed,
16 and given that it was unclear whether reduced tar and nicotine claims could be substantiated, the
17 FTC decided in December 1959 to ban all tar and nicotine claims in cigarette advertising. *See*
18 Correspondence from William H. Brain (FTC, Bureau of Consultation, Attorney) to John Vance
19 Hewitt (Conboy, Hewitt, O'Brien and Boardman), December 17, 1959 (JD-063266).
20 Advertisements began to reflect this change in policy by 1960.
21 **Q. How did the FTC implement this decision?**
22 A. The FTC submitted a letter to the major cigarette manufacturers indicating that it would
23 consider such claims a violation of the Cigarette Advertising Guides. The letter stated, in part:

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> [W]e wish to advise that all representations of low or reduced tar or nicotine, whether by filtration or otherwise, will be construed as health claims. No hedging statements, such as taste or sales volume qualifications, will be considered as changing the character of reduction claims. Our purpose is to eliminate from cigarette advertising representations which in any way imply health benefit.
>
> This advice is being disseminated on an industry-wide basis and prompt, simultaneous compliance is urgently requested. Any advertising which is not promptly brought into conformance with this request will be forwarded to other Bureaus looking forward to mandatory procedures. As always, the services of this Bureau are available to cigarette advertisers to confer on proposed advertising.

Correspondence from William H. Brain (FTC, Bureau of Consultation, Attorney) to John Vance Hewitt (Conboy, Hewitt, O'Brien and Boardman), December 17, 1959 (JD-063266).

Q. How did the companies respond?

A. The companies eliminated tar and nicotine claims in ads just as the FTC desired, effectively ending the "tar derby."

Q. What did the FTC say about this?

A. For example, Chairman Kinter said:

> During the past few days I have had numerous calls from representatives of the press, seeking comment on a rumor on Madison Avenue that as a result of conferences between the Commission's Bureau of Consultation and members of the cigarette industry a drastic change in the tone of cigarette advertising was forthcoming. I want to take this opportunity to confirm this rumor. We are assured that as soon as it becomes mechanically possible there will be no more tar and nicotine claims in cigarette advertising. We are particularly happy that these claims are being eliminated simultaneously and on an industry-wide basis because the individual claims were confusing to the public and possibly misleading in view of the absence of a satisfactory uniform testing method and proof of advantage to the smoker. Rather than continue the apparent conflict in claims the tobacco industry through the aegis of the Bureau of Consultation decided to halt the "tar derby." In doing this, the Commission is satisfied that not only has it eliminated confusing and misleading advertising claims, but also that simultaneous action avoids any competitive inequity.

Statement of FTC Chairman Earl W. Kintner, February 5, 1960 [TIFL 0303832-TIFL 0303833] (JD-080095).

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Q. Was the FTC satisfied with this industry response?

A. Yes, the FTC thanked the cigarette companies for being responsive. Chairman Kintner stated:

> On behalf of the Commission I should like to express my appreciation of the cigarette industry, its attorneys and advertising agencies for their part in this gigantic undertaking. … It is no small feat … to change the major emphasis of a number of brands. … In my view, this is a landmark example of industry-government cooperation in solving a pressing problem.

Statement of FTC Chairman Earl W. Kintner, February 5, 1960 [TIFL 0303832-TIFL 0303833] (JD-080095).

Q. Was there an economic incentive for the cigarette companies?

A. Yes. As discussed above, research indicates the companies had a clear incentive to avoid FTC challenges to their advertising.

Q. Do you find that this sort of incentive to comply with the FTC repeated over time?

A. Yes, it did.

Q. What effect did the ban on tar and nicotine advertising have on tar levels?

A. The ban on tar and nicotine advertising reduced the incentive for cigarette manufacturers to reduce tar levels and reduced the amount of information available to consumers regarding brand specific tar levels. Following the ban on tar and nicotine advertising, the rate of decline in tar levels slowed.

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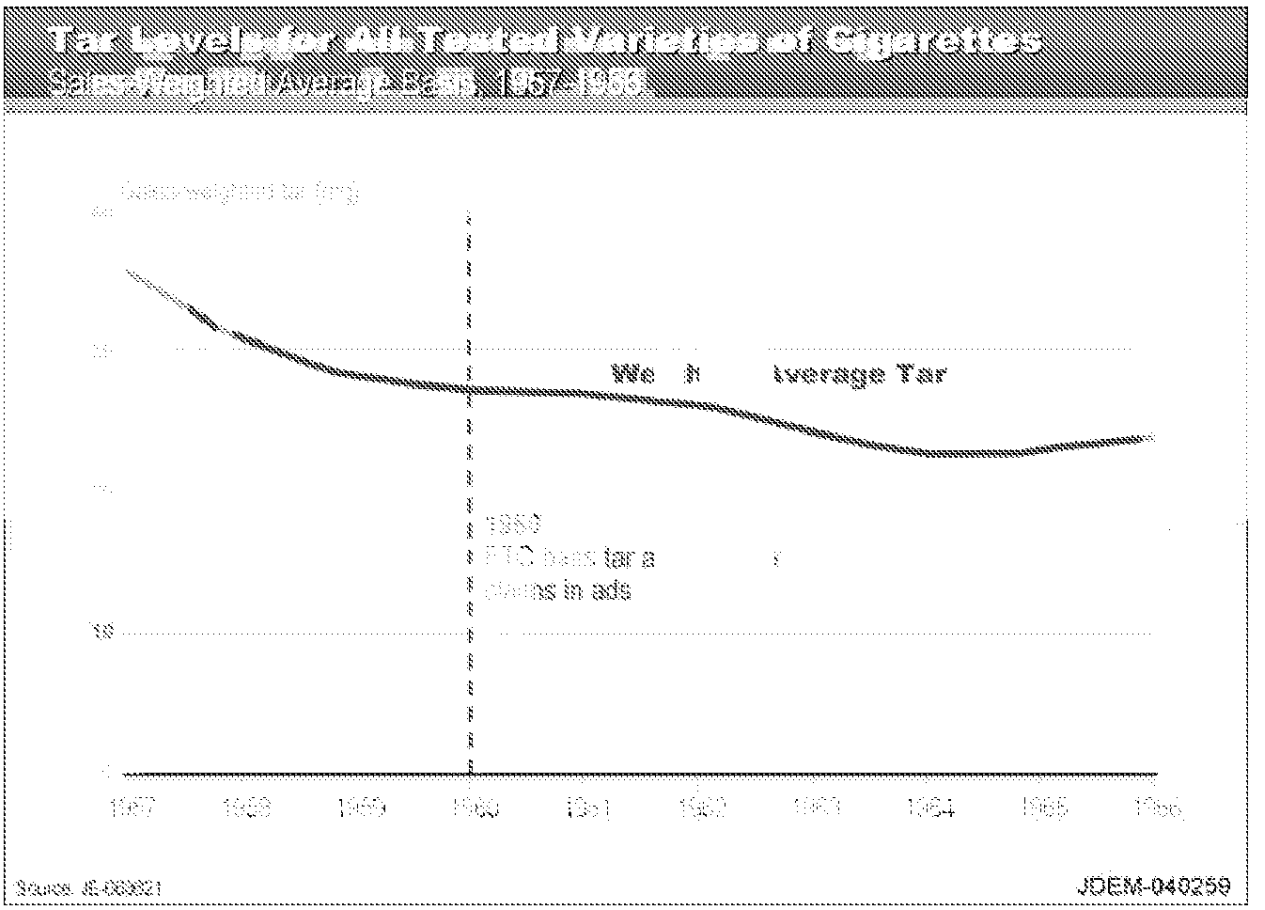

Q. Did the FTC consult with members of the public health community about these actions of the FTC?

A. Yes. The FTC consulted with the public health community to help determine whether the FTC's ban on tar and nicotine claims was appropriate. In particular, Assistant Surgeon General James W. Hundley provided his views regarding the potential advantages of lower yield cigarettes, and determined that there is not enough evidence to support a conclusion that lower yield cigarettes are less hazardous in part due to issues related to compensation:

> Are Any Cigarettes Safer?
>
> No one really knows. It could be established by reliable scientific testimony that the answer to this question is beyond present human knowledge. On the question of whether cigarettes are safer by reason of lower tar and nicotine content, Dr. Hundley has serious doubts. He feels that the number of cigarettes each individual smokes per day is determined by smoking until a certain level of

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> something is reached. If this is so, cutting down on the contents of the mainstream smoke from one cigarette would be *compensated* for by smoking more cigarettes…. Dr. Hundley feels that the Government has no reason to be defensive concerning its handling of the cigarette-health question to date.

As reported in Correspondence from Commission from Bryan H. Jacques (Director, Bureau of Industry Guidance) to Commission, June 1, 1962 [FTCDOCS-0122-0004] – [FTCDOCS-0122-0005] (emphasis added) (JD-004408).

Q. Was the reaction to the FTC's ban universally accepted by members of the public health community?

A. No. Many members of the public health community criticized the FTC's ban on health claims regarding filter cigarettes.

E. 1960-1964 – FTC Studies The Cigarette Industry And Investigates Whether Evidence Regarding Smoking And Health Was Sufficient To Warrant Further FTC Actions

Q. Dr. Langenfeld, what actions did the FTC take or consider in the early 1960s regarding cigarette advertising?

A. Between 1960 and 1964, the FTC studied the cigarette industry and investigated whether the evidence linking smoking to lung cancer was sufficient to mandate cigarette health warnings or to warrant other actions. During this period, some within the FTC apparently believed that enough evidence existed to establish a causal link between smoking and lung cancer, while others did not believe that the evidence was sufficient to support this conclusion. *See* "Affirmative Disclosure of Possibly Deleterious Effects of Smoking Cigarettes," [FTCDOCS-0122-0010] – [FTCDOCS-0122-0050] (JD-043646).

Q. Did the FTC work with the Surgeon General during this time period?

A. Yes. In an effort to come to a conclusion regarding the smoking and health issue, the FTC asked the Surgeon General for guidance. According to the FTC, its request was one of the

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reasons the Surgeon General formed an advisory committee to research the smoking and health issue, which in turn resulted in the publication of the 1964 Surgeon General's Report on Smoking and Health. *See* Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service, U.S. Department of Health, Education, and Welfare, Public Health Service Publication No. 1103, First Printing January 11, 1964, Second Printing January 1965, pp. 7-8 (JE-059895); Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, p. 2 (JD-061508).

Q. What else did the FTC do in this time period?

A. During this period, the FTC's Bureau of Economics also studied the cigarette industry as part of the agency's deliberative process. In 1964, the FTC issued a staff report that provided data on cigarette consumption, cigarette advertising expenditures, tobacco farming, and the six leading cigarette manufacturers from the early 1950s through 1963. *See* A Report on Cigarette Advertising and Output, Staff Report of the Bureau of Economics, 1964 (JE-023731).

Q. What effect did the FTC's actions during this time period have on the development of potentially less hazardous cigarettes and on smoking rates?

A. FTC economist Dr. John Calfee wrote a 1985 FTC working paper that concluded FTC regulation, including the Cigarette Advertising Guides and its ban on tar and nicotine advertisements from 1960 to 1964, retarded the innovation of potentially less hazardous cigarettes and slowed the decline in smoking prevalence and per capita consumption of cigarettes with lower nicotine and tar. *See* Calfee, John E., *Cigarette Advertising, Health Information and Regulation Before 1970*, Bureau of Economics, Federal Trade Commission, Working Paper No. 134, December 1985 (JD-000435).

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1 **F. 1964 – FTC Trade Regulation Rule and the Cigarette Advertising Code**

2 **Q. Dr. Langenfeld, did you consider the release of the 1964 Surgeon General Report in**
3 **your research?**

4 A. Yes.

5 **Q. According to FTC staff, did the 1964 Surgeon General Report have any effect on**
6 **smoking behavior?**

7 A. The FTC recognized that the 1964 Surgeon General Report linking smoking to lung
8 cancer in men and subsequent FTC and Congressional actions had a major effect on demand for
9 cigarettes. A 1979 FTC staff report found that the 1964 Surgeon General Report caused a
10 reduction in per capita smoking attributed largely to a reduction in the "participation rate" of
11 smokers. *See* Richard A. Ippolito, R. Dennis Murphy, and Donald Sant, *Staff Report on*
12 *Consumer Responses to Cigarette Health Information*, Federal Trade Commission, August 1979,
13 pp. 6, 9-10 (JD-040742).

14 **Q. What did the FTC do after the release of the Surgeon General Report?**

15 A. Eleven days after the release of the Surgeon General Report in January 1964, the FTC
16 proposed a three-part trade regulation rule, which would have replaced the 1955 Cigarette
17 Advertising Guides. *See* Trade Regulation Rule for the Prevention of Unfair or Deceptive
18 Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and
19 Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, pp. 3-5 (JD-061508).
20 According to the Statement of Basis and Purpose ("SBP") in the proposed rule, the FTC
21 expressed concerns about the impact of cigarette smoking on health, and in particular
22 emphasized the exposure of youth to cigarette ads:

23 [T]hroughout the law in general and under Section 5 of the Trade Commission
24 Act in particular, it has been recognized that minors constitute an especially
25 vulnerable and susceptible class requiring special protection from business

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> practices that would not be unlawful if they only involved adults. Accordingly, a marketing practice, directed in a substantial part toward minors, that interferes substantially and unjustifiably with their freedom of buying choice is an unfair or deceptive act or practice even if it is not especially pernicious as to adults. Thus, cigarette advertising or labeling that does not disclose the health hazards of cigarette smoking may be independently unlawful under Section 5 … because it "exploit[s] consumers, children, who are unable to protect themselves."

Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking And Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, p. 107 (citation omitted) (JD-061508).

Q. What provisions did the proposed Trade Regulation Rule contain?

A. The proposed rule contained the following provisions, which the FTC indicated would address the issues it had identified in its SBP, including its concerns about youth exposure to cigarette ads:

1. First, it would have required a warning statement on cigarette packaging and in cigarette advertisements.

2. Second, it would have proscribed cigarette advertisements that explicitly or implicitly suggested that cigarettes (a) promote good health or physical well being; (b) cigarettes are not a health hazard; or (c) specific cigarette brands are less of a hazard to health than other cigarette brands.

3. Third, it would also have proscribed cigarette advertisements containing "any statement as to the quantity of any cigarette-smoke ingredients (e.g., tars and nicotine) which has not been verified in accordance with a uniform and reliable testing procedure approved by the Federal Trade Commission."

Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, pp. 4-5 (JD-061508).

Q. Were there any exceptions to the second provision?

A. An exception to the second provision would have existed if the advertising company had substantiation acceptable to the FTC that proved the accuracy and significance of the claim, and

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1 "all facts material to the health consequences of smoking the advertised cigarettes are clearly,
2 prominently and intelligibly disclosed in close conjunction with the claim." Trade Regulation
3 Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in
4 Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose
5 of Rule, June 22, 1964, p. 5 (JD-061508).

6 **Q. Did the FTC adopt all three parts of the rule?**

7 A. No. The FTC only adopted the first rule, requiring health warnings.

8 **Q. Why did the FTC not adopt the other parts of the rule?**

9 A. The FTC did not adopt the other two rules because the cigarette companies responded to
10 the proposed rule by forming the Cigarette Advertising Code, which was announced to the public
11 in April of 1964. This Code restricted health claims in advertising, including tar and nicotine
12 claims, and went beyond the proposed rule in addressing the FTC's stated concerns about
13 cigarette advertising and marketing that potentially could affect youth. The cigarette companies,
14 in developing the Cigarette Advertising Code, were clearly responding to pressure from the FTC
15 to address what the FTC considered problems in cigarette advertising. *See* Trade Regulation
16 Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in
17 Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose
18 of Rule, June 22, 1964, pp. 124-125 (JD-061508).

19 **Q. Why do you say the FTC dropped its other two proposed rules?**

20 A. The FTC expressed its approval of the cigarette industry's response as being adequate to
21 address the issues in these two provisions, while warning the cigarette companies that it would
22 continue to carefully monitor industry's efforts to eliminate what the FTC believed to be unfair
23 or deceptive advertisements. Specifically, the FTC stated:

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> We have declared the standards of conduct to which the members of the cigarette industry must conform in order to avoid violation of the Trade Commission Act. The industry has indicated an intention of acting voluntarily to end undesirable practices in the area covered by proposed rules 2 and 3, and should the industry succeed in eliminating such practices, there will be no need for formal Commission action. The Commission has therefore determined not to adopt proposed rules 2 and 3, or any similar provision, at this time as formal trade regulation rules, even though the record of this proceeding, and this report, fully justify doing so. The Commission will maintain a close surveillance of the industry's efforts to eradicate, through voluntary efforts, all traces of unfairness and deception in affirmative representations or suggestions in all cigarette advertising and labeling.

Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking And Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, pp. 124-125 (JD-061508).

Q. Was the Cigarette Advertising Code similar to the provisions in the proposed Trade Regulation Rule (TRR)?

A. Yes, the Cigarette Advertising Code's health claim and tar and nicotine provisions closely tracked the proposed TRR. The following are the health claim provisions outlined in the initial proposed TRR:

> No cigarette advertisement shall state or imply, by words, pictures, symbols, sounds, devices or demonstrations, or any combination thereof, that smoking the advertised cigarettes
>
> (a) promotes good health or physical well-being,
>
> (b) is not a hazard to health, <u>or</u>
>
> (c) is less of a hazard to health than smoking other brands, except that a specific and factual claim respecting the health consequences of smoking the advertised cigarettes may be advertised if
>
> (1) the advertiser, before making the claim, has substantial and reliable evidence to prove the accuracy and significance of the claim, <u>and</u>
>
> (2) all facts material to the health consequences of smoking the advertised cigarettes are clearly, prominently and intelligibly disclosed in close conjunction with the claim."

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Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, p. 5 (footnote omitted) (emphasis in original) (JD-061508).

The following are the Cigarette Advertising Code's health claim provisions:

> No cigarette advertising which makes a representation with respect to health shall be used unless:
>
> (a) The Administrator shall have determined that such representation is significant in terms of health and is based on adequate relevant and valid scientific data; or
>
> (b) If the Administrator shall have determined it to be appropriate, a disclaimer as to significance in terms of health shall be set forth in such advertising in substance and form satisfactory to the Administrator; or
>
> (c) The Administrator shall have determined that the representation with respect to health in such advertising is not material.

Cigarette Advertising Code, pp. 5-6 (JD-011171).

Q. What were the specific health claims in advertising prohibited under the initial proposed Trade Regulation Rule?

A. The FTC provided specific types of health claims that would be prohibited under the proposed trade regulation rule, including the following:

> 1. The other problem is that of a literally true claim respecting the health consequences of smoking the advertised brand which, nevertheless, is deceptive because of failure to disclose material facts that qualify and explain the claim. Suppose that an advertiser truthfully states that his cigarettes contain no argon. Without further elaboration, many consumers would assume that the elimination of such an ingredient lessened the hazards of smoking the brand--else why would the advertiser make such a claim? The impression created by such an advertisement will be false if, for example, there is a lack of substantial evidence that the elimination of argon lessens the hazards of smoking. That material qualifying fact must be disclosed in order to dispel that false impression created by the claim standing alone.
>
> 2. An advertisement states, "Brand Z Filters Out All of the Argon From Cigarette Smoke". If the advertiser, before publishing this advertisement,

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has substantiated the accuracy of the claim that his filter eliminates all of the argon from cigarette smoke, he would be permitted to advertise it. If, however, it is not scientifically established that the elimination of argon significantly lessens the health hazards of cigarette smoking, the advertiser would be required so to state in close conjunction with his claim.

3. An advertisement states, "Brand Y Contains the New Improved Kryptonite Filter". Such an advertisement would be unlawful even if the caution requirement of Rule 1 had been fully complied with, since the advertisement would give many people the impression that Brand Y's filter makes smoking Brand Y safe or comparatively safe.

4. An advertisement states, 'Buy Brand X, the Cigarette That Gives You Extra Protection'. Such an advertisement would be unlawful even if the caution requirement of Rule 1 had been fully complied with.

Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, pp. 3, 100 (JD-061508).

Q. How did these restrictions compare to the FTC's substantiation policy?

A. These restrictions were consistent with the FTC's substantiation policy.

Q. How did these restrictions compare to the Cigarette Advertising Code?

A. These restrictions were also consistent with the Cigarette Advertising Code?

Q. What does the fact that the Cigarette Advertising Code mirrored the proposed Trade Regulation Rule's substantiation provisions tell you about the FTC's ability to affect the cigarette companies' advertising behavior?

A. The FTC clearly had substantial influence over the cigarette companies' advertising behavior.

Q. Is this outcome consistent with Dr. Jeffrey Harris' theory that the FTC was ineffective in changing cigarette advertising content (Trial Tr. at 2548)?

A. No. This outcome is inconsistent with Dr. Harris' theory.

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Q. What about the tar and nicotine provisions in the TRR and Cigarette Advertising Code?

A. The Cigarette Advertising Code's tar and nicotine provisions also closely tracked the proposed trade regulation rule. The following are the tar and nicotine claim provisions outlined in the initial proposed TRR:

> No cigarette advertisement shall contain any statement as to the quantity of any cigarette-smoke ingredients (e.g., tars and nicotine) which has not been verified in accordance with a uniform and reliable testing procedure approved by the Federal Trade Commission.

Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, p. 5 (JD-061508).

The following are the Cigarette Advertising Code's tar and nicotine claim provisions:

> No cigarette advertising shall be used which refers to the removal or the reduction of any ingredient in the mainstream smoke of a cigarette, except that it shall be permissible to make a representation as to the quantity of an ingredient present in the mainstream smoke or as to the removal in toto of an ingredient from the mainstream smoke, or as to the absence of an ingredient normally present in the mainstream smoke, if:
>
> > (a) The Administrator shall have determined that such representation is significant in terms of health and is based on adequate relevant and valid scientific data; or
> >
> > (b) A disclaimer as to significance in terms of health shall be set forth in such advertising in substance and form satisfactory to the Administrator; or
> >
> > (c) The Administrator shall have determined that a disclaimer is unnecessary for the reason that the representation in such advertising has no health implication or that such implication is not material; and
> >
> > (d) The quantity of such ingredient is determined and expressed in accordance with uniform standards adopted by the Administrator for measuring the quantity of the ingredient present in the mainstream smoke, provided that, until such uniform standard is so adopted, the quantity of such ingredient may be determined and expressed

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> in accordance with any recognized scientifically valid method disclosed to the Administrator without any requirement of confidential treatment.

Cigarette Advertising Code, pp. 6-7 (JD-11171).

Q. What did the FTC say in the TRR about youth exposure to cigarette advertising?

A. The FTC again outlined in the Statement of Basis and Purpose (SBP) of its Trade Regulation Rule, that it was concerned about youth exposure to cigarette advertising:

> Section 5 of the Federal Trade Commission Act requires scrupulous adherence to the standards of fairness, accuracy, and full disclosure in the marketing of cigarettes. It is all the more imperative to hold cigarette manufacturers to the duty of fair and non-deceptive marketing in view of the evident attractiveness of cigarette smoking to children and teenagers, and the fact that it is habit-forming.

Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose of Rule, June 22, 1964, p. 99 (citation omitted) (JD-061508). However, the FTC apparently believed that the combination of warnings and provisions of the Cigarette Advertising Code addressed this issue, since the rule only required cigarette companies to put health warnings on cigarette packs and in advertisements.

Q. How did the Cigarette Advertising Code address those concerns?

A. The Cigarette Advertising Code addressed concerns about cigarette and youth marketing by placing restrictions on marketing practices that would potentially appeal to underage consumers. Specifically, the Cigarette Advertising Code included, among others, the following provisions:

> No advertising on TV or radio or publications directed to person under 21.
>
> No ads in school, college, or university media.
>
> No ads in comic books or in comic sections of newspapers.
>
> No samples to persons under 21 years of age.

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No samples at schools, colleges, or universities.

No ads that smoking is essential to social prominence, distinction, success, or sexual attraction.

Models in ads must be 25 or older and not made to appear younger.

No testimonials from athletes or celebrities who have special appeal to those under 21.

Cigarette Advertising Code, pp. 4-5 (JD-11171).

Q. Does the Cigarette Advertising Code contain a provision prohibiting all marketing to adult smokers under 21?

A. No.

Q. Have you seen evidence that the FTC construed it that way?

A. No.

Q. What was the response of public health officials to the Cigarette Advertising Code?

A. The cigarette industry's adoption of the Cigarette Advertising Code received support from public health officials. For example, Surgeon General Luther Terry stated:

> It should be emphasized at this point that the Department welcomes the current efforts of the cigarette manufacturing industry to develop principles and procedures for policing its own advertising and labeling practices.

Testimony of Dr. Luther L. Terry (former U.S. Surgeon General), *Cigarette Labeling and Advertising*, Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 88th Congress, 2nd Session, June 23-25, 29, and July 2, 1964, p. 39 (JD-060596).

The president of the American Cancer Society also provided expressed similar support:

> The American Cancer Society believes in the American free enterprise system, and in the right of an industry to govern itself for the benefit of mankind. But the industry must make this self-evident, or submit to Government control. We are heartened by the recent steps that have been taken in this direction by the advertising media and the tobacco industry to develop an advertising code and the appointment of Gov. Robert B. Meyner as the advertising czar.

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Testimony of Dr. Wendell G. Scott (President, American Cancer Society), *Cigarette Labeling and Advertising*, Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 88th Congress, 2nd Session, June 23-25, 29, and July 2, 1964, p. 293 (JD-001371).

G. 1965 Labeling Act

Q. Dr. Langenfeld, let's now address the 1965 Labeling Act. Are you familiar with it as well?

A. Yes. After the FTC promulgated its rule in 1964 mandating cigarette warnings, Congress passed the Federal Cigarette Labeling and Advertising Act (FCLAA) in 1965 based on information from a variety of sources, including the FTC. A key provision of the act was a requirement that all cigarette packs contain a health warning. *See Federal Cigarette Labeling and Advertising Act*, Pub. L. 89-92, 15 U.S.C. § 1333 (JD-001371). Congress considered additional actions, and gave the FTC responsibilities for monitoring the cigarette industry and making policy recommendations to Congress. The cigarette companies and the FTC complied with FCLAA.

Q. What happened at this time to the FTC's Trade Regulation Rule mandating warnings?

A. Following the passage of FCLAA, the FTC vacated its Trade Regulation Rule mandating warnings. The FTC warned that it was going to continue to enforce its policy against what it believed to be unfair or deceptive cigarette advertising and promotion.

Q. Did Congress consider requiring tar and nicotine yield disclosures on cigarette packs and in advertising?

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A. Yes, Congress considered requiring tar and nicotine yield disclosures on cigarette packs and in advertising. *See Cigarette Labeling and Advertising*, Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 88th Congress, 2nd Session, June 23-25, 29, and July 2, 1964 (JD-002014); *Cigarette Labeling and Advertising*, Hearings Before the Committee on Commerce, United States Senate, 89th Congress, 1st Session, March 22-25, 29-30, and April 1-2, 1965 (JD-081106).

Q. What did the Surgeon General and the FTC advise Congress to do on this matter?

A. Both the Surgeon General and the FTC advised Congress not to include such a requirement, because the scientific evidence was not sufficient to support the conclusion that lower yield cigarettes were less hazardous than higher yield cigarettes. Surgeon General Dr. Luther Terry provided the following advice to the Senate:

> Both bills provide for a statement as to contents. S. 547 would require that each package bear a statement as to the content of each "incriminated agent" found in cigarette smoke and S. 559 would require a statement as to the average tar and nicotine yield as measured by a specified method. At one time, the use of such claims caused widespread confusion as to the possible healthfulness of one cigarette as opposed to another. While it seems at least plausible that cigarettes with lower tar and nicotine may present lesser health hazards, there is presently no proof that this is so. … We would recommend that, instead of setting forth in the statute particular components of tobacco smoke that must be disclosed on the label and the method of determining such components quantitatively, regulatory authority be provided to decide which particular components of cigarette smoke should be disclosed on the label.

Testimony of Dr. Luther L. Terry (U.S. Surgeon General), *Cigarette Labeling and Advertising*, Hearings Before the Committee on Commerce, United States Senate, 89th Congress, 1st Session, March 22-25, 29-30, and April 1-2, 1965, p. 34 (JD-081106).

FTC Chairman, Paul Rand Dixon, provided similar testimony:

> You will notice that in our [Trade Regulation] rule we did not cover [tar and nicotine disclosure] or propose anything on this point. I would endorse the Surgeon General's statement to you, which I believe in effect said he thought that it would be better to leave this situation alone. It could result in some other kind

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> of a misrepresentation or something misleading if one cigarette came out and said it had 1.5 in tar, and so much nicotine in it, and another came out and said it had only 1. Basically this study has never arrived at what is a safe tar and nicotine content, and they have not arrived at what in smoking is the agent as such that is causing cancer.

Testimony of Paul Rand Dixon (Chairman, FTC), *Cigarette Labeling and Advertising*, Hearings Before the Committee on Commerce, United States Senate, 89th Congress, 1st Session, March 22-25, 29-30, and April 1-2, 1965, p. 419 (JD-081106).

Q. At this time did the Surgeon General discuss compensation?

A. Yes, in a letter to Senator Cooper, which was included in the record of the Senate hearings, the Surgeon General also discussed the issue of compensation:

> A part of the problem here is whether the filter in addition to removing tar, nicotine, or other elements of cigarette smoke might also lead to different levels of cigarette consumption and different amounts of inhalation, et cetera.

Testimony of Paul Rand Dixon (Chairman, FTC), *Cigarette Labeling and Advertising*, Hearings Before the Committee on Commerce, United States Senate, 89th Congress, 1st Session, March 22-25, 29-30, and April 1-2, 1965, p. 902 (JD-081106).

Q. What did Congress ultimately decide?

A. Congress apparently took the FTC's and the Surgeon General's advice on low tar and nicotine cigarettes not necessarily being less hazardous, and did not include a tar and nicotine disclosure requirement as part of FCLAA.

Q. Did Congress continue to support the FTC's role with respect to cigarette policy?

A. Yes. Although Congress decided to replace the FTC's Trade Regulation Rule with its own policy on warnings, Congress in the FCLAA continued to support the FTC's active role in shaping the advertising and promoting of cigarettes.

Q. What did the FCLAA require with respect to FTC actions?

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A. FCLAA required FTC action and oversight related to cigarette marketing. Specifically, the Act required the FTC to report to Congress annually concerning "(A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate." *Federal Cigarette Labeling and Advertising Act*, Pub. L. 89-92, 15 U.S.C. § 1333 (JD-001371).

H. Regulation of Cigarette Advertising on Television, and Broadcast Cigarette Advertising Ban

Q. Dr. Langenfeld, did the FTC regulate cigarette advertising on radio and television during the 1950s and 1960s?

A. Yes, this type of advertising was also under the FTC's purview.

Q. Did there come a time when the FTC no longer regulated cigarette advertising on radio and television?

A. Yes, on January 2, 1971.

Q. What happened at that time that led the FTC to stop regulating cigarette advertising on radio and television?

A. Congress passed legislation banning cigarette advertising on radio and television, that took effect on that date. That advertising ban has been in effect continuously since that time. *See Public Health Cigarette Smoking Act of 1969,* Pub. L. 91-222, 15 U.S.C. § 1333 (JD-003589).

VI. FTC TAR AND NICOTINE POLICY

Q. Dr. Langenfeld, in the mid-1960s, what did some in the public health community say about the FTC ban on tar and nicotine claims?

A. Many members of the government, government agencies, and many in the public health community disagreed with the FTC's ban on tar and nicotine claims and requested that the

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Commission change its policy. *See* Correspondence from Paul Rand Dixon (Chairman, FTC) to Warren G. Magnuson (Chairman, Committee on Commerce, United States Senate), April 11, 1966 (JD-040931).

Q. What were some of the recommendations of the public health community and agencies regarding the disclosure of tar and nicotine levels?

A. Correspondence between FTC Chairman Paul Rand Dixon and Senator Warren Magnuson summarizes some of the recommendations of other federal agencies and the public health community regarding the disclosure of tar and nicotine levels. *See* Correspondence from Paul Rand Dixon (Chairman, FTC) to Warren G. Magnuson (Chairman, Committee on Commerce, United States Senate), April 11, 1966 (JD-040931). These, and similar opinions, provided the bases for the FTC's change in policy. Examples cited by Chairman Dixon include the following:

> National Interagency Council on Smoking and Health's Board of Directors (1/13/1966) – "hopes that you will take the steps necessary to make it permissible for cigarette manufacturers to list tar and nicotine content on the labels of cigarette packages."
>
> American Cancer Society (3/21/1966) – "the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of the tar and nicotine content of cigarette smoke in cigarette advertising and on the packages of the various brands of cigarettes."
>
> George E. Moore, M.D., Ph.D., Director of Roswell Park Memorial Institute (3/24/1966) – "When possible disadvantages of informing the public of the current amounts of tar and nicotine are weighed against the advantages of such a policy, it is clearly in the public interest to provide this information. <u>For this reason we strongly urge</u> that the FTC exert every effort to favor such a policy."

Correspondence from Paul Rand Dixon (Chairman, FTC) to Warren G. Magnuson (Chairman, Committee on Commerce, United States Senate), April 11, 1966 (emphasis in original) (JD-040931).

By 1967, the Department of Health, Education and Welfare stated that:

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> [o]n the basis of available evidence regarding the effects of individual constituents of cigarette smoke, their relationship to the overall hazards of cigarette smoking, and the relative precision regarding measurement techniques, the identification of "tar" and nicotine levels can provide valuable information on overall dosage.

Correspondence from John Gardner (Secretary, HEW) to Senator Warren G. Magnuson, January 10, 1967 (JD-053570).

Q. Did this affect the FTC's policy on tar and nicotine?

A. Yes. In March of 1966, the FTC announced a change in its policy on tar and nicotine claims. The FTC specifically instituted a policy of encouraging the marketing of lower tar and nicotine cigarettes. *See* Federal Trade Commission Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, June 30, 1968, p. 17 (JD-043418); Deposition of C. Lee Peeler, *United States v. Philip Morris, Inc.,* Volume I, July 30, 2002, p. 167.

Q. How did the FTC's policy on tar and nicotine become implemented?

A. The FTC decided to allow tar and nicotine claims if those claims were substantiated, and specifically informed the cigarette manufacturers that the Commission would not consider such claims a violation of the Cigarette Advertising Guides "so long as (1) no collateral representations (other than factual statements of tar and nicotine contents of cigarettes…) are made, expressly or by implication, as to reduction or elimination of health hazards …." *Federal Trade Commission News Release*, March 25, 1966 [1000293445] (JD-004612).

Q. How did the FTC define substantiation with respect to tar and nicotine claims?

A. Substantiation regarding tar and nicotine claims was established in two stages:

First, based on its review of the evidence, the FTC believed that lower yield cigarettes were potentially less hazardous than higher yield cigarettes.

Second, the FTC considered reduced yield claims substantiated by a standardized, FTC approved test method. In 1966, the FTC informed the cigarette companies that the Cambridge

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1 Filter Method (also referred to as the Ogg Method) was the only acceptable method for testing
2 tar and nicotine yields. *See Federal Trade Commission News Release*, March 25, 1966
3 [1000293445] (JD-004612).

4 **Q. What were the elements of the FTC's policy that encouraged the marketing of lower**
5 **tar and nicotine cigarettes?**

6 A. This policy had four specific elements: a) the adoption of a single standardized,
7 government sanctioned method to measure tar and nicotine yields in cigarette smoke; b) the
8 publication of tar and nicotine yields for cigarettes in advertisements; c) allowing low tar claims,
9 including descriptors, in cigarette advertising under specific conditions; and d) a prohibition on
10 collateral health claims in cigarette advertising.

11 **Q. How did the cigarette companies respond to the FTC's new policy?**

12 A. The cigarette companies followed the FTC's policy by a) using the FTC Method results
13 to substantiate tar and nicotine claims; b) including tar and nicotine disclosures in
14 advertisements; c) using descriptors that were tied to FTC Method results; and d) generally not
15 making collateral health claims in cigarette advertising.

16 **A. <u>The FTC Method</u>**

17 **Q. What is the FTC Method?**

18 A. It is a standardized method, which was adopted by the FTC in August of 1967, to
19 measure the tar and nicotine content of cigarettes. In 1966, the Commission initiated a
20 proceeding to adopt this official standardized tar and nicotine testing method, where they
21 requested and received comments from interested parties, including public interest groups and
22 the cigarette companies. *See* Official Transcript of Proceedings Before the Federal Trade
23 Commission, In the Matter of: Methods to be Employed in Determining Tar and Nicotine
24 Content of Cigarettes, November 30, 1966 (JD-004748); "FTC to Begin Cigarette Testing,"

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Federal Trade Commission News Release, August 1, 1967 (JE-061264). Hearings were held, and before these hearings, several cigarette manufacturers submitted written comments to the Commission. *See* Cigarettes and Related Matters: Methods to be Employed in Determining Tar and Nicotine Content, November 28, 1966 (JD-042408).

Q. What did the cigarette companies say about testing the method that the FTC proposed adopting at this time?

A. The cigarette companies said that the testing method did not mimic actual smoking behavior. In particular, they stated:

> The Ogg Method does not measure the volume of smoke – or the PM or nicotine in the volumbre of smoke – that any human being will draw from smoking any particular cigarette. Each smoking characteristic is leveled or averaged out by the standard method.
>
> No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the PM quantity in the smoke generated.
>
> Even with the same type of cigarette, individual smokers take a different number of puffs per cigarette depending upon the circumstances. When concentrating, or talking, the number of puffs is usually less. When listening, or required to listen, to another person talking, the number of puffs per cigarette, as well as the duration of each puff, usually increases. Smoking rates while reading a book may differ from smoking rates while viewing a television program. The number of puffs and puff duration (as well as butt length) will vary according to emotional state. Some smokers customarily put their cigarette down in an ashtray where they burn between puffs; other smokers constantly hold cigarettes in their mouths; others hold them between their fingers. …
>
> [T]here is no relationship between standardized machine smoking of cigarettes and the volume of smoke which any smoker will get in smoking down to any selected butt length. …
>
> The Ogg Method does not and cannot measure these many variations in human smoking habits. It does not measure PM or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the PM or nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method.

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Cigarettes and Related Matters, Methods to be Employed in Determining Tar and Nicotine Content, Supplementary Observations following November 30, 1966 Hearing, December 20, 1966, pp. 2-3 (emphases in original) (JD-004362).

Q. What testing method did the FTC decide upon?

A. The FTC ultimately decided to adopt a slightly modified version of what was referred to as the Cambridge Filter Method, and it became known as the FTC Method. In its press release announcing the adoption of the FTC Method, the Commission reiterated that the FTC Method does not mimic actual human smoking, nor does it measure the tar and nicotine inhaled by the average smoker. Specifically, the FTC stated:

> No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion. The speed at which one smokes varies both among smokers, and usually also varies with the same individual under different circumstances even within the same day. Some take long puffs (or draws); some take short puffs. That variation affects the tar and nicotine quantity in the smoke generated….
>
> The Cambridge Filter Method does not and cannot measure these many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method.
>
> Accordingly, the testing method should not be considered defective because it does not rely on "averages." There are too many variables as to both smokers and smoking conditions for any average to be meaningful. Test results phrased in terms of an "average" smoker could be misleading to the public, because a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly "average" smoker. It should be emphasized that the Cambridge Filter Method itself did not purport to duplicate an "average" smoker. Rather, it was an amalgam of many choices—some of them arbitrary. For example, the temperature and humidity specified in that Method were not determined by reference to the "average" temperature or "average" humidity at which people smoke cigarettes. There is no human smoker who smokes, and no cigarette that is smoked, under conditions that precisely duplicate either the Cambridge Filter Method in its original form or as modified by the Commission.

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> Thus, to reiterate, the uniform method determined by the Commission has as its purpose measurement of the tar and nicotine generated by cigarettes when smoked according to that procedure.

"FTC to Begin Cigarette Testing," *Federal Trade Commission News Release*, August 1, 1967 (JD-048746).

Q. Did the FTC establish a lab for measuring tar and nicotine?

A. Yes, it did. *See* "FTC to Begin Cigarette Testing," *Federal Trade Commission News Release*, August 1, 1967 (JD-048746).

B. <u>The Cigarette Manufacturers' and Consumers' Responses to the FTC Tar and Nicotine Policy</u>

Q. Did the cigarette companies adopt the FTC's method for measuring tar and nicotine in cigarettes?

A. Yes, the cigarette companies responded to the FTC's policy by only using the FTC Method to substantiate tar and nicotine claims.

Q. What initiatives did cigarette companies engage in that were responsive to the FTC's tar and nicotine policy?

A. Some of the cigarette companies immediately responded to this FTC initiative by placing ratings in their ads, although Cigarette Advertising Code officials opposed the change. Lorillard introduced a new "low tar" cigarette, *True,* in 1966 and began an advertising campaign that included tar and nicotine ratings. American Tobacco also began emphasizing tar and nicotine in its *Carlton* advertisements.

Q. How did the administrator of the Cigarette Advertising Code respond?

A. Robert Meyner, the Cigarette Advertising Code Administrator, opposed the change in FTC policy. He wrote the following to the Commission:

> [T]he Commission [appears] to confirm its recognition that a factual statement of "tar" and nicotine content may be a health claim. It would be difficult to find any

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> other reason for consumer interest in it except as responsive to the publicity about these ingredients in relation to health. Without a specific disclaimer of health significance in any quantitative statement of "tar" and nicotine, there is grave question as to the propriety of taking a step which would lead the public to believe that any specified quantity of a particular ingredient in cigarette smoke has health significance when adequate scientific proof of that fact is lacking.

Correspondence from Robert B. Meyner (Administrator, CAC) to Paul Rand Dixon (Chairman, FTC), at 3, April 21, 1966 (JD-003681). The Cigarette Advertising Code required a disclaimer that was to be used when tar and nicotine were disclosed in ads, and Meyner encouraged the FTC to require such a disclaimer. This information was essentially addressed in the 1967 FTC press release I just mentioned, in various public statements by the FTC published in the *Federal Register*, and more recently on the FTC's website. *See* "Up in Smoke: The Truth About Tar and Nicotine Ratings," *FTC Consumer Alert*, May 2000 (JD-004380).

Q. Did the FTC study the impact of its policy change?

A. Yes. The FTC later sponsored studies examining how cigarette manufacturers and consumers responded to the marketing of low yield cigarettes, including examining the impact of low yield cigarette marketing on the types of cigarettes produced and smoked, as well as examining the impact of advertising on the level of cigarette consumption. There were four such FTC-sponsored studies between 1989 and 1993 which I have reviewed in reaching my opinions in this case. These studies were conducted by FTC staff economist Dr. Joseph P. Mulholland, and are entitled as follows:

1. "The Effect of Advertising on the Level and Composition of Cigarette Consumption," November 13, 1989 (JD-003722).
2. "Policy Issues Concerning the Promotion of Less Hazardous Cigarettes," August 2, 1990 (JD-004314).
3. "Behavior and Risk Perception Among Smokers of Low-Yield Cigarettes: An Analysis of the 1986 Adult Use of Tobacco Survey," August 4, 1992 (JD-004335)
4. "Risk Perceptions of Low-Tar Cigarettes," June 6, 1993 (JD-003510).

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These are the types of reports that I frequently rely on in reaching opinions regarding industrial organization issues.

Q. Did the FTC consider whether cigarette advertising increased overall demand for cigarettes?

A. Yes. FTC economist Dr. Mulholland examined whether cigarette advertising, in general, increased aggregate demand for cigarettes. Dr. Mulholland's 1989 report, "The Effects of Advertising on the Level and Composition of Cigarette Consumption," contains analysis of (a) the potential effect of cigarette advertising on aggregate demand, and (b) the potential negative impact advertising restrictions could have on the development and acceptance of potentially less hazardous cigarettes.

Q. What did the study find?

A. It did not find evidence to support the theory that cigarette advertising increased cigarette sales. In particular, the study finds:

> 1. In regard to smoking levels, analysis of the relevant research literature indicates no persuasive support for predictions that advertising restrictions would appreciably reduce the demand for cigarettes. Although theory and anecdotal evidence suggest the likelihood that advertising has some stimulative effect on cigarette demand, the empirical research indicates that this effect is probably not large. Alternatively, advertising has been associated with the development and acceptance of low-tar cigarettes, which have served to reduce (but by no means eliminate) the toxic effects of smoking. Thus proposals to restrict advertising need to consider the potential costs that such actions may impose by discouraging further attempts to develop less hazardous cigarettes. Mulholland, Joseph P., "The Effect of Advertising on the Level and Composition of Cigarette Consumption," November 13, 1989, p. v, [FTCDOCS-0218-0436] – [FTCDOCS-0218-0558] (JD-003722); *see also* Mulholland, Joseph P., "Policy Issues Concerning the Promotion of Less Hazardous Cigarettes," August 2, 1990 (JD-004314).
>
> 2. The fairly uniform inability of the various research approaches to document a sizeable advertising effect on demand does suggest, however, that the influence of advertising on the aggregate demand for cigarettes is probably small. While the empirical research is far from perfect, it does

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not, taken as a whole, exhibit a pervasive bias against finding a significant effect of advertising upon demand. Mulholland, Joseph P., "The Effect of Advertising on the Level and Composition of Cigarette Consumption," November 13, 1989, p. ix, [FTCDOCS-0218-0436] – [FTCDOCS-0218-0558] (JD-003722).

3. The continued decline in smoking levels, despite increasing levels of cigarette advertising expenditures, is consistent with the view that advertising has been relatively ineffectual. Mulholland, Joseph P., "The Effect of Advertising on the Level and Composition of Cigarette Consumption," November 13, 1989, p. ix, [FTCDOCS-0218-0436] – [FTCDOCS-0218-0558]. (JD-003722).

Q. Why do cigarette companies advertise if cigarette advertising does not substantially affect demand?

A. FTC studies have concluded that cigarette companies advertise to gain and protect market share. *See* Mulholland, Joseph P., "The Effect of Advertising on the Level and Composition of Cigarette Consumption," November 13, 1989, p. 18-20, 25-26 [FTCDOCS-0218-0436] – [FTCDOCS-0218-0558] (JD-003722).

Q. Dr. Krugman also testified that "the very large expenditures made by the tobacco companies on advertising and promotion would not be justified by the goal of brand switching." Written Direct Testimony of Dr. Dean M. Krugman, at 151. Do you agree with this opinion?

A. No.

Q. Why do you disagree?

A. For one thing, Dr. Krugman focuses on aggregate cigarette advertising and promotion numbers published by the FTC as the basis for his opinion. As I will discuss later, the vast majority of the cigarette advertising and promotion expenditures published by the FTC are actually just pure price cuts. Dr. Krugman's use of these aggregate advertising and promotion figures as a basis for his opinion is therefore misguided.

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Q. Are there other reasons why you disagree with Dr. Krugman's opinion?

A. Yes. There is another economic flaw in Dr. Krugman's reasoning. Dr. Krugman focuses on the brand switching argument, but does not address share protection issues. Cigarette advertising is not just designed to convince smokers to switch to a particular brand, it is also used to protect share. One share point is worth hundreds of millions of dollars to cigarette manufacturers. It also ignores "occasional" switching, *i.e.*, the large percentage of smokers who split purchases between two brands. It is therefore worthwhile for cigarette companies to spend substantial sums of money to protect as well as take share.

Q. Did the FTC conduct follow up research that addressed issues other than the effect of advertising on cigarette demand?

A. Yes. Dr. Mulholland's 1990 study, "Policy Issues Concerning the Promotion of Less Hazardous Cigarettes," August 2, 1990 (JD-004314), indicates that the FTC's tar and nicotine policy has generally had a positive effect on consumers. Specifically, that study finds:

> [Page 15]: [A] reasonable inference from the relevant epidemiological and behavioral research is that switching to cigarettes of lower tar content continues to reduce a smoker's health risk to a significant degree, albeit probably by a lower amount than would be predicted by comparing machine-estimated tar and nicotine yields.
>
> [Page 19]: Demand for low-tar cigarettes was initially generated (and periodically reinforced) by scientific information, to a large extent transmitted through the media, indicating that smoking entailed a significant health risk and that this risk could be reduced by switching to cigarettes with a lower tar and nicotine content. [fn omitted] Consumer acceptance was further enhanced by the development of reliable rating systems for comparing tar and nicotine content among brands. Within this context, advertising played a central role in the development and acceptance of cigarettes with increasingly lower tar levels.
>
> [Page 28]: Overall, smokers take a surprisingly skeptical attitude toward the risk benefits of low yield cigarettes. Only 45.5 percent, for example, believe that there are any risk differences among brands. A much lower percentage, 23.6 percent, believe that their particular brand exhibits lower than average risk. [table omitted] Analyzing this question in greater detail reveals an expected association between tar content of brand and a smoker's perception of its relative risk: the lower the tar

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level, the more likely that a smoker will perceive a risk advantage from that brand [table omitted]. Nevertheless, the association between tar and relative risk perception is not particularly strong. Except for the ultra-low tar group (<=3mg), the majority of smokers in the remaining tar groups see no risk advantage to their brands. Even for members of the ultra-low tar group, 41 percent replied that their brand was no lower in risk than other cigarettes.

Q. How do Dr. Mulholland's studies fit with FTC policy?

A. The results of Dr. Mulholland's studies support the FTC's policy to encourage the development and marketing of low yield cigarettes.

Q. Did other FTC studies examine the move to lower tar and nicotine cigarettes?

A. Yes, a 1979 FTC Staff report by economists at the agency found that there was substitution toward lower tar and nicotine cigarettes due to the release of information on smoking and health in 1953 and the Surgeon General's report in 1964. The report concluded that, "as a result of cigarette health publicity, smokers will choose cigarette types that are about 18 percent lower in nicotine content than would otherwise have been the case." Ippolito, Richard A., R. Dennis Murphy, and Donald Sant, *Staff Report on Consumer Responses to Cigarette Health Information*, Federal Trade Commission, August 1979, pp. 34-36 (JD-040742).

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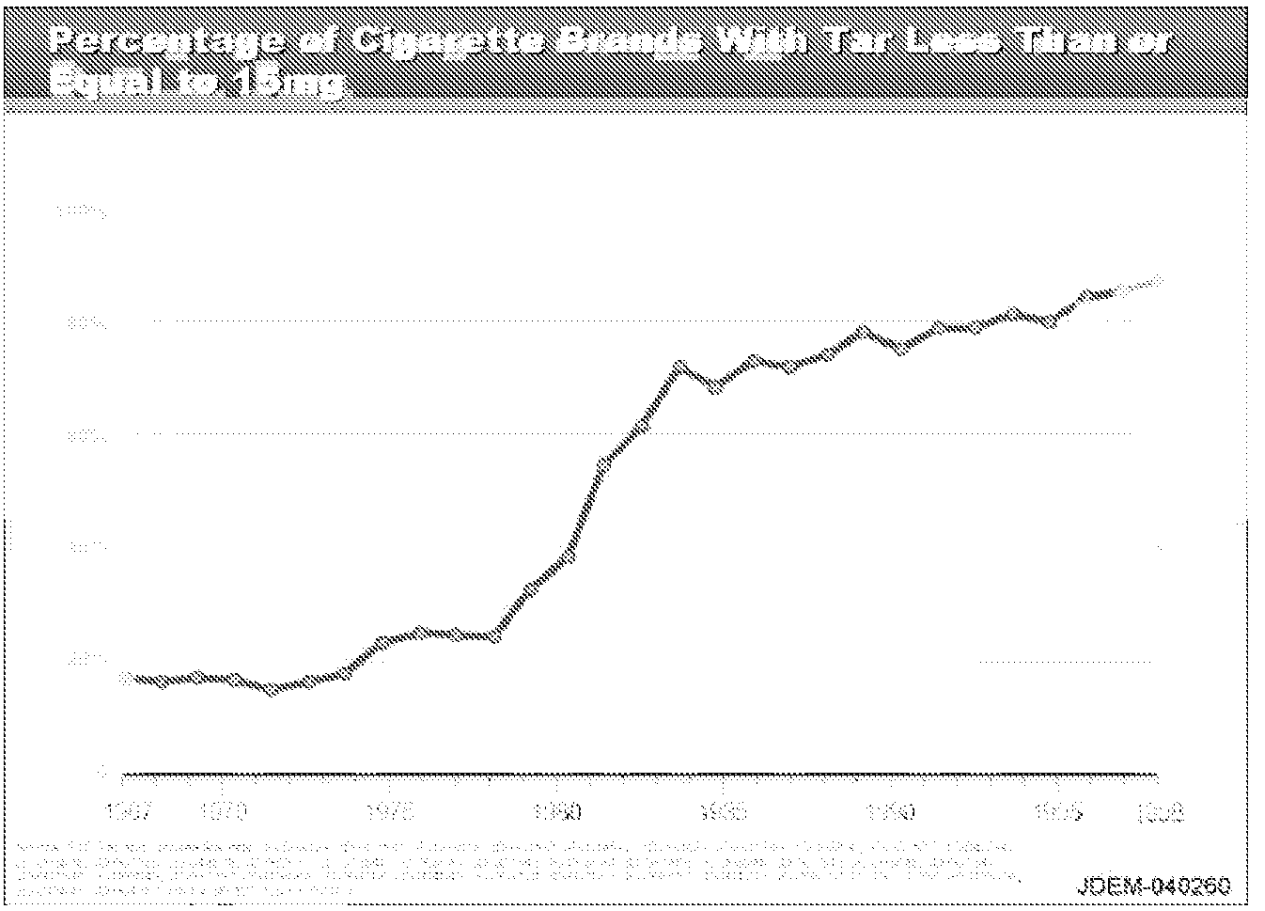

Q. How did the cigarette companies respond to the FTC policy to promote lower tar and nicotine cigarettes?

A. All of the cigarette companies eventually responded to the FTC's low tar policy by increasingly marketing low yield products. The percentage of brands sold with relatively low tar yields grew substantially following the FTC instituting its low tar policy, as can be seen in JDEM-040260.

Similarly, the total domestic share of cigarettes yielding 15 mg or less tar also grew substantially after the FTC instituted its policy encouraging the development and marketing of low yield cigarettes, as shown in JDEM-040261.

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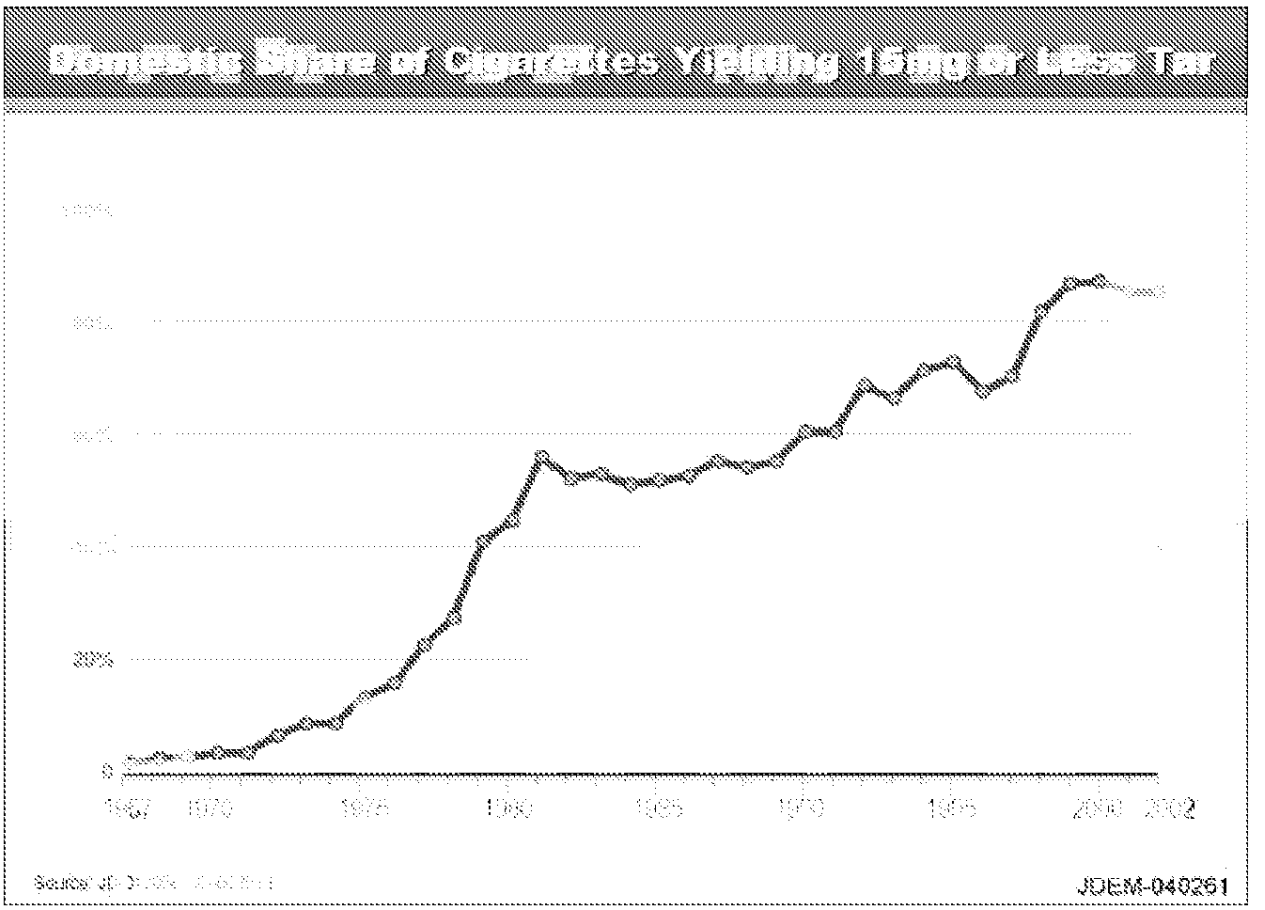

Q. Did the FTC require the companies to disseminate tar and nicotine information?

A. Not in 1967, but it did take action to require tar and nicotine ratings be placed in ads in 1970. Moreover, members of Congress urged the FTC to work out a "voluntary" agreement.

Q. What action did the FTC take?

A. The FTC initiated a rulemaking that would have required tar and nicotine ratings to be placed in cigarette ads in 1970. *See* Advertising of Cigarettes: Notice of Public Hearing and Opportunity to Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule, 35 Fed. Reg. 12671, August 8, 1970 (JD-004350).

Q. Did the FTC adopt this rule?

A. No.

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Q. Why not?

A. The FTC wanted quick action and wanted to avoid a potentially protracted rulemaking proceeding. The FTC stated at the time:

> The Commission's objective is to insure that all cigarette advertising make these tar and nicotine disclosures as soon as possible. If the industry can devise a voluntary plan that is feasible and appropriate the Commission is willing to consider it. A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately.

"FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content," *Federal Trade Commission News*, October 1, 1970 (JD-061533). The FTC, therefore, gave the cigarette companies 30 days to draft and submit a plan to the FTC for placing FTC "tar" and nicotine ratings in advertisements. *Id.*

Q. Was there support for the FTC's approach and, if so, why?

A. The FTC's approach and its effectiveness were recognized by key members of Congress. For example, according to Senator Magnuson:

> There is a new proposed rule of the Trade Commission to require tar and nicotine listing in the advertising of cigarettes. As you know, we have been working with the tobacco industry for a long time, and I must say there has been good cooperation with the industry, seeking a voluntary agreement by them to do just what the Trade Commission is suggesting in the proposed rulemaking.
>
> … [I]t seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.

Statement by Senator Warren G. Magnuson, *Nomination—1970*, Hearing Before the Committee on Commerce, United States Senate, 91st Congress, 2nd Session, August 20, 1970, p. 172 (JD-043431).

Q. Did the FTC eventually force an agreement that required the FTC's tar and nicotine ratings to be placed in cigarette ads by the major manufacturers?

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A. Yes. The FTC and the cigarette companies negotiated an agreement to require tar and nicotine disclosures in advertisements. *See* "FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content," *Federal Trade Commission News*, October 1, 1970 (JD-061533); Correspondence from Allen F. Brauninger (Attorney, Bureau of Consumer Protection, FTC) to Federal Trade Commission, October 19, 1970 [FTCDOCS-0117-0004] – [FTCDOCS-0117-0006] (JD-004534); Correspondence from Allen F. Brauninger (Attorney, Bureau of Consumer Protection, FTC) to Federal Trade Commission, November 9, 1970 [FTCDOCS-0121-0272] – [FTCDOCS-0121-0279] (JD-043436); Correspondence from Miles W. Kirkpatrick (Chairman, FTC) to Federal Trade Commission, November 24, 1970 [FTCDOCS-0121-0280] (JD-043437); Correspondence from Joseph Martin, Jr. (General Counsel, FTC) to Miles W. Kirkpatrick (Chairman, FTC), November 27, 1970 [FTCDOCS-0121-0281] – [FTCDOCS-0121-0285] (JD-043438); Correspondence from Allen F. Brauninger (Attorney, Bureau of Consumer Protection, FTC) to Federal Trade Commission, December 21, 1970 [FTCDOCS-0415-0495] – [FTCDOCS-0415-0528] (JD-043441); Correspondence from Joseph W. Shea (Secretary, FTC) to General Counsel (FTC), Director of Bureau of Consumer Protection (FTC), Director of Public Information (FTC), and Legal and Public Records (FTC), December 22, 1970 [FTCDOCS-0121-0297] – [FTCDOCS-0121-0298] (JD-043442); "FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette Advertising After Industry Amends Voluntary Plan," *Federal Trade Commission News*, December 23, 1970 (JD-004547).

The FTC made the following statement following its acceptance of the industry's tar and nicotine disclosure plan:

> It appears to be in the public interest to afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan which it has proposed. … The Commission believes that if the amended plan operates satisfactorily, the

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> public will, at the earliest possible time, be informed of the tar and nicotine content of cigarettes. In addition, the Commission will be able to employ substantial manpower and funds which would otherwise have been devoted to hearings and court proceedings to dealing with the serious problems relating to cigarette advertising.

"FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette Advertising After Industry Amends Voluntary Plan," *Federal Trade Commission News*, December 23, 1970 (JD-004547).

Q. Do you consider the placement of tar and nicotine information in advertisements to be voluntary?

A. No, it is clear that it was compelled by FTC actions and threat of actions, as just described.

Q. Did the companies publish tar and nicotine numbers in their advertisements and, if so, what numbers did they use?

A. The cigarette manufacturers followed the agreement by publishing tar and nicotine ratings in ads. The published FTC test results provided the basis for the tar and nicotine disclosures in advertisements. *See* Correspondence from Allen F. Brauninger (Attorney, Bureau of Consumer Protection, FTC) to Commission, December 21, 1970 [FTCDOCS-0415-0495] – [FTCDOCS-0415-0528] (JD-043441).

C. <u>The FTC and "Descriptors" for Lower Yield Cigarettes</u>

Q. Dr. Langenfeld, I would like to focus on cigarette "descriptors." What do you understand the term "descriptors" to mean in this case?

A. Descriptors like "low tar," "lights," and "ultra-lights" are generally used to distinguish lower-yield brand extensions from higher-yield products in the same brand family. Descriptors

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provide consumers a relatively easy way to distinguish between different products within the same brand family.

Q. Did the FTC formally address the issue of low tar and nicotine descriptors?

A. Yes, many times. For example, the American Brands case in 1971 clarified the FTC's policy regarding low tar claims, including the use of descriptors. In this case, the FTC ordered American to cease and desist from:

> Stating in advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in "tar" by use of the words "low," "lower," or "reduced" or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of:
>
> 1. The "tar" and nicotine content in milligrams in the smoke produced by the advertised cigarette….
>
> For purposes of … this order:
>
> 1. The term "tar" shall mean the total particulate matter in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes; and
>
> 2. The term "nicotine" shall mean total alkaloids as nicotine in the mainstream smoke of cigarettes as determined by the testing method employed by the Federal Trade Commission in its testing of the smoke of domestic cigarettes.

In the Matter of American Brands, Inc., 79 F.T.C. 255 (1971).

Q. How are "low tar" cigarettes defined?

A. "Low tar" cigarettes are generally considered by the FTC as those cigarettes with 15 mg or less tar as measured by the FTC Method.

Q. How did it come about that low tar is considered 15 mg or less tar?

A. Based on my review of the evidence, the FTC was the first entity to publicly use the 15 mg benchmark delineating low tar cigarettes from higher tar cigarettes. In its 1968 Report to Congress, the FTC stated:

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> An analysis of sales data provided by cigarette manufacturers indicates that sales of comparatively low yield cigarettes, e.g., for purposes of this report only, those having 15 milligrams (mg.) of tar or less, have not been extensive thus far. Three categories of cigarettes, classified according to tar yields, divided the market in 1967 as follows: 15 mg. and under – 2%; 16-21 mg. – 59%; 22 mg. and over – 39%.

Federal Trade Commission Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act, June 30, 1968, pp. 18-19 (JD-043418).

Q. What other times has the FTC designated low tar cigarettes?

A. The FTC officially designated cigarettes with 15 mg or less tar as "low tar" in 1979. In its 1979 Report to Congress, the FTC stated:

> The FTC has not defined "ultra-low tar", or any term related to "tar" level except for "low tar," which the FTC defines as 15.0 mg. or less tar. As a result advertisers use a variety of terms to distinguish among "tar" levels.

Federal Trade Commission Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act for the Year 1979, p. 11 (JD-002086). The FTC repeated this statement in its 1980 Report to Congress. *See* Federal Trade Commission Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act for the Year 1980, p. 18 (JD-002088).

Q. Have descriptors like "light" and "ultra-light" been used in a consistent manner?

A. There is no official FTC definition for the descriptors "light" and "ultra-light." However, the industry practice has been to use the "light" descriptor only with cigarette brands that have an FTC-measured tar yield of 7-14 mg., and the "ultra-light" descriptor with cigarette brands that have an FTC-measured tar yield of 6 mg. or less. See, for example, *In re: Petition of Rulemaking Concerning Tar and Nicotine Testing and Disclosure, Before the Federal Trade Commission,* September 18, 2002 (JE-045823).

Q. Is this a practice that has gone on for well over 20 years?

A. Yes.

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Q. During that time, has the FTC had descriptor information and tar yield information for the brands that the defendants in this case market and sell?

A. Yes.

Q. Has the FTC ever taken any action to indicate that defendants' use of the "light" or "ultra-light" descriptions is unfair, deceptive, or fraudulent?

A. No.

D. 1987 – FTC Transfers Testing Responsibility To The Tobacco Institute Testing Laboratory (TITL)

Q. Dr. Langenfeld, earlier you mentioned FTC cigarette testing. For how long did the FTC continue to operate its in-house cigarette testing laboratory?

A. Until 1987, when the FTC decided to close its in-house cigarette testing laboratory.

Q. Why did the FTC close its in-house laboratory?

A. The cigarette industry had been also testing cigarettes using the FTC Method, and the Commission considered these efforts duplicative. FTC Chairman Oliver explained the reasoning behind the FTC's decision to close its in-house laboratory:

> [T]he commission established its laboratory in order to facilitate the use of a standardized methodology for the testing of the tar and nicotine content of cigarettes. In this regard, we have been highly successful, for the procedure followed by all the companies is the one used by the commission and is in fact called the "FTC method." Having established the commission's methodology as a uniform testing standard, the commission concluded that there was no longer a need for the Federal Government to duplicate the testing program already being conducted in the private sector, which provides the same information. We have every expectation that accurate tar and nicotine information will continue to be provided to consumers without the unnecessary expense of governmentally supported testing. If for any reason that expectation proves incorrect, we are prepared to take vigorous corrective action.

FTC Nicotine Program, Hearing Before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, 100th Congress, 1st Session, May 7, 1987, p. 6 (JD-004347).

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Chairman Oliver also emphasized that the Commission would continue to enforce its policy regarding tar and nicotine claims in advertising:

> I wish to emphasize that the closing of our in-house facilities will not significantly affect our ability to ensure the accuracy of tar and nicotine claims. … The Commission will continue to monitor advertising for deceptive tar and nicotine claims and bring appropriate enforcement actions. Because tar and nicotine ratings are an area of intense competition within the industry, we expect that if a company were to publish incorrect ratings, we will hear quickly from its competitors. In addition, we will continue in the future to collect tar and nicotine ratings from the companies and report that information to Congress. As with all data that we collect from the cigarette companies, we will scrutinize the ratings for accuracy and reliability. If we should have a question about any individual rating, we have access to [U.S. government] testing facilities at Oak Ridge National Laboratory.

FTC Nicotine Program, Hearing Before the Subcommittee on Transportation, Tourism, and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, 100th Congress, 1st Session, May 7, 1987, pp. 5-6 (JD-004347).

Q. Does the industry still test cigarettes under the FTC Method?

A. Yes.

Q. Where does this occur?

A. At the Tobacco Industry Testing Laboratory, which is the same facility as the Tobacco Institute Testing Laboratory. The name was changed, however, after the Tobacco Institute was dissolved pursuant to the terms of the Master Settlement Agreement in the state attorneys' general cases.

Q. Did the FTC make arrangements to monitor the Tobacco Industry Testing Laboratory?

A. Yes. The FTC outlined the procedures that had to be used by the TITL, and the Commission had unlimited access to the TITL's facilities. An FTC representative was designated to monitor the TITL's activities. *See* Correspondence from John P. Rupp (Attorney

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for Cigarette Companies, Covington & Burling) to Judith P. Wilkenfeld (Program Adviser, Cigarette Advertising and Testing, FTC), June 30, 1987 [FTCDOCS-0395-0114] – [FTCDOCS-0395-0120] (JD-060577). In addition, the FTC had access to other testing facilities if needed, including the Oak Ridge National Laboratory cigarette testing facility.

Q. Does the FTC obtain test results from the TITL?

A. The FTC continues to obtain test results from the TITL through compulsory process. *See Tar, Nicotine, and Carbon Monoxide of the Smoke of 1206 Varieties of Domestic Cigarettes for the Year 1994*, Federal Trade Commission, 1997, pp. 1-2. (JD-003554).

E. Proposed changes to FTC Testing, Compensation Issues, and Low Yield Cigarettes and "Descriptors"

Q. Dr. Langenfeld, were there further developments in the 1970s regarding how the FTC's tar and nicotine policy was to be implemented?

A. Yes. In 1977, Lorillard asked the FTC to change the insertion depth used for testing cigarettes so that vent-holes would not be covered during the testing. *See* 42 Fed. Reg. 21155, April 25, 1977 (JD-041092). The FTC conducted an investigation and solicited comments. *See* Correspondence from John F. Dugan (Acting Secretary, Acting Secretary) to Shepard P. Pollack (Vice-President, Philip Morris), April 25, 1977 (JD-004366); 43 Fed. Reg. 11856, March 22, 1978 (JD-004368).

Q. What comments did the FTC receive?

A. The FTC received comments from the cigarette companies and the National Cancer Institute. Both Philip Morris and R.J. Reynolds recommended that the insertion depth not be changed. *See* Correspondence from Alexander Holtzman (Associate General Counsel, Philip Morris) to Russell Hatchl (Attorney, Bureau of Consumer Protection, FTC) July 26, 1977 (JD-040970). The Deputy Director of the National Cancer Institute's Division of Cancer Cause and

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Prevention, Dr. Gio Gori, recommended that the vent-holes be left unblocked during testing. He wrote:

> Cigarettes containing ventilated filtration systems based on filter tip perforations must be inserted to a length which ensures that the perforations are exposed to the air. Tar and nicotine deliveries … will be seriously overestimated if the perforations are downstream of the dental dam airtight seal.

Correspondence from Gio B. Gori (Deputy Director, Division of Cancer Cause and Prevention, HEW) to Russell Hatchl (Attorney, Bureau of Consumer Protection, FTC), June 10, 1977 (JD-062161).

Q. What decision did the FTC come to with respect to insertion depth?

A. The FTC ultimately decided not to change the insertion depth and stated "that a change in the insertion depth would cause a lack of continuity with previous test results…. Since the Commission lacks information bearing on the question of whether a new insertion depth would be more consistent with smoking patterns, it has determined not to change the standard in place since 1967." 43 Fed. Reg. 11856, 11857, March 22, 1978 (JD-004368).

Q. Do cigarette companies comply with this FTC decision currently?

A. The FTC ensures that defendant cigarette companies continue to comply with the specifics outlined by the FTC Method.

Q. Did the FTC take further action at or around this time?

A. In 1978, the FTC issued an advisory opinion regarding what it considered Lorillard's request to "disseminate cigarette advertisements headlining, without qualification, a tar value higher than the latest published FTC number." *In re Lorillard: Advisory Opinion Letter,* 92 F.T.C. 1035 (1978) (JD-003986). In response, the FTC concluded that

> it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure. If the headlined tar level differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated.

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1 *In re Lorillard: Advisory Opinion Letter,* 92 F.T.C. 1035 (1978) (JD-003986).

2 **Q. Has the FTC ever rescinded this advisory opinion?**

3 A. The FTC has not rescinded this advisory opinion, and the defendant cigarette companies
4 continue to comply with the FTC tar and nicotine disclosure policy.

5 **Q. Does the opinion apply only to Lorillard?**

6 A. Perhaps in a formal way, but as I have said, these types of actions by the FTC are noticed
7 and generally adhered to by entire industries.

8 **Q. Did the FTC request information concerning its test method and related issues after**
9 **the 1970s?**

10 A. Yes. FTC staff addressed compensation issues and tar and nicotine disclosures in the
11 1981 Staff Report on the Cigarette Advertising Investigation. The FTC also conducted an
12 extensive investigation of its testing methods in the 1980s related to the advertising and testing
13 of *Barclay* cigarettes, particularly addressing the issue of smoker compensation and the FTC's
14 rating system. In the 1990s, the FTC's continuing interest in providing useful information to
15 consumers regarding tar and nicotine levels led the FTC to solicit the advice of the scientific
16 community regarding potential changes and recommendations concerning the FTC Method for
17 testing tar and nicotine. Specifically, the FTC requested that the National Cancer Institute
18 ("NCI") "provide a comprehensive review of the existing scientific evidence on issues relating to
19 low-tar and ultra low-tar cigarettes, as well as data and recommendations on behavioral aspects
20 of these issues" in 1994. Correspondence from Janet D. Steiger (Chairman, FTC) to Samuel
21 Broder (Director, National Cancer Institute), July 20, 1994, p. 1 (JD-041571). In addition, in
22 1997, the FTC announced a proposal for a revised testing method and requested public comment.
23 *See FTC Press Release,* September 9, 1997 (JD-002497); 62 Fed. Reg. 48158, September 12,

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1997 (JD-040038). These inquiries specifically addressed the FTC's testing method, compensation, and the use of low tar and nicotine descriptors.

F. 1976 – 1981 – FTC Cigarette Advertising Investigation

Q. Dr. Langenfeld, you mentioned the 1981 FTC Staff Report on the Cigarette Advertising Investigation. How did this report come about?

A. In 1976, FTC staff launched an investigation of cigarette advertising that included the examination of, among other things, cigarette advertising practices, the effectiveness of warning labels, public awareness of the hazards associated with smoking, and compensation issues.

Q. What prompted this investigation of cigarette advertising?

A. The FTC stated that its motivation for initiating the investigation was to put the Commission "in a better position to report to the Congress on cigarette advertising and promotion, and in order to determine whether there may be deception and unfairness in the advertising and promotion of cigarettes." Federal Trade Commission Report to Congress Pursuant to the Public Health Cigarette Smoking Act For the Year 1976, p. 5 (JD-002062).

Q. Was compensation discussed in this report?

A. Yes. The staff stated that "there is evidence that some smokers who switch to low 'tar' cigarettes compensate for the reduced level of nicotine by a variety of methods that increase their intake of 'tar' and nicotine to levels substantially above those indicated by machine testing." Myers, Matthew L., Craig Iscoe, Carol Jennings, William Lenox, Eleanor Minsky, and Andrew Sacks, *Staff Report on the Cigarette Advertising Investigation*, Federal Trade Commission, May 1981, p. 1—54 (footnote omitted) (JD-001032). Methods of compensation discussed by the FTC staff included, "inhaling more often, inhaling deeper, smoking the cigarette closer to the filter, or simply smoking more cigarettes." *Id.* The FTC staff also discussed vent-hole blocking. *See id.* at p. 1—55.

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1 **Q. What became of this investigation?**

2 A. The staff submitted to the Commission the results of their investigation and as well as
3 recommendations for regulatory changes in a report to Congress in 1981. *See* Myers, Matthew
4 L., Craig Iscoe, Carol Jennings, William Lenox, Eleanor Minsky, and Andrew Sacks, *Staff*
5 *Report on the Cigarette Advertising Investigation*, Federal Trade Commission, May 1981 (JD-
6 001032).

7 **Q. Did the FTC staff recommend that the FTC Method be modified?**

8 A. No, the staff did not recommend changes in the FTC Method despite their awareness of
9 compensation issues. The staff did recommend, among other things, that Congress require tar
10 and nicotine disclosures on cigarette packs. *See* Myers, Matthew L., Craig Iscoe, Carol Jennings,
11 William Lenox, Eleanor Minsky, and Andrew Sacks, *Staff Report on the Cigarette Advertising*
12 *Investigation*, Federal Trade Commission, May 1981, p. 5—47 (JD-001032).

13 **Q. Did Congress adopt the FTC staff recommendation to require tar and nicotine**
14 **disclosures on cigarette packs?**

15 A. No.

16 **G. <u>1981 – 1985 – FTC Investigation of *Barclay* and Compensation</u>**

17 **Q. For how long had the FTC been made aware of smoker compensation?**

18 A. The FTC had been made aware of the potential for smoker compensation relative to
19 testing procedures at least since 1962, when the Assistant Surgeon General warned the FTC of
20 smokers potentially compensating when using lower yield cigarettes. *See* Correspondence from
21 Commission from Bryan H. Jacques (Director, Bureau of Industry Guidance) to Commission,
22 June 1, 1962, [FTCDOCS-0122-0004] – [FTCDOCS-0122-0005] (JD-004408).

23 In 1966 the cigarette companies had also warned the FTC that its standardized testing
24 would not predict how much tar and nicotine any individual smoker would get, and the FTC's

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statements reflected those warnings. *See* "Cigarettes and Related Matters, Methods To Be Employed in Determining Tar and Nicotine Content, Supplementary Observations Following November 30, 1966 Hearing," pp. 2-3 (JD-004748); "FTC to Begin Cigarette Testing," *Federal Trade Commission News Release*, August 1, 1967 (JD-048746).

In 1977, Lorillard asked the FTC to change the insertion depth used for testing cigarettes so that vent-holes would not be covered during the testing. *See* 42 Fed. Reg. 21155, April 25, 1977 (JD-041092); *FTC Press Release,* April 25, 1977 (US-03640). The FTC conducted an investigation and solicited comments. *See* Correspondence from John F. Dugan (Acting Secretary, FTC) to Shepard P. Pollack (Vice President, Philip Morris), April 25, 1977 (JD-004366); 43 Fed. Reg. 11856, March 22, 1978 (JD-004368).

It is also clear that the cigarette companies highlighted to the FTC issues related to compensation no later than the FTC's *Barclay* investigation and litigation in 1981. The FTC extensively examined issues related to "compensation" during its investigation of *Barclay* cigarettes in the early 1980s. Topics reviewed by the FTC included vent-hole blocking and the use of alternative methods to measure intake by smokers, including smoke dilution measurement methods, analysis of constituent retention in smoked cigarette butts, and the measurement of cotinine levels in smokers' plasma. The FTC reviewed information provided by the cigarette companies, experts hired by the cigarette companies, and experts hired by the FTC. The investigation and subsequent litigation lasted more than three years. Despite the conclusion reached by various experts involved in the investigation that smokers of low-yield cigarettes often engage in substantial compensatory smoking behavior, the FTC decided not to modify the FTC Method or its tar and nicotine policy.

Q. What was the issue for the FTC regarding *Barclay* cigarettes?

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1 A. In 1981, Brown & Williamson began marketing *Barclay* cigarettes, making claims that
2 *Barclay* was "99% tar free" and emphasizing its 1 mg tar rating. *Barclay* contained a unique
3 filter design that included air channels within the filter. *See* Correspondence from Abe Krash, et
4 al. (Outside Counsel, Philip Morris,) to James H. Sneed (Director, Bureau of Consumer
5 Protection , FTC), July 10, 1981 (JD-040121). Shortly after the introduction of *Barclay*, both
6 Philip Morris and R.J. Reynolds notified the FTC that the unique design of *Barclay* produced
7 low machine tar yields, however, actual smokers would block or collapse the air channels. *See*
8 *id.* The FTC opened an investigation and commenced an informal comment period.

9 **Q. Did cigarette companies submit comments to the FTC concerning *Barclay* and the**
10 **FTC Method?**

11 A. The major cigarette companies submitted comments advocating different approaches to
12 the problem. *See* Memorandum to the Federal Trade Commission from Philip Morris
13 Incorporated Concerning Barclay Cigarettes and a Proposed Change in the Apparatus Used in
14 the Commission's Laboratory for Testing "Tar" Delivery, July 10, 1981 (JD-040728);
15 Correspondence from Martin London (Outside Counsel, B&W to Matthew L. Myers (Attorney,
16 Division of Advertising Practices, FTC), July 16, 1981 (JD-003643); Correspondence from
17 Jerome I. Chapman (Outside Counsel, Philip Morris) to Matthew L. Myers (Attorney, Division
18 of Advertising Practices, FTC), July 17, 1981 (JD-043496); Supplemental Memorandum to the
19 Federal Trade Commission from Philip Morris Incorporated Concerning Measurement of the
20 Relative "Tar" Deliveries of Barclay and Other Cigarette Brands Through Analysis of Retained
21 Nicotine in Cigarette Butts, July 30, 1981 (JD-003645); Correspondence from Abe Krash
22 (Outside Counsel, Philip Morris) to Matthew L. Myers (Attorney, Division of Advertising
23 Practices, FTC), August 18, 1981 (JD-054033); Reply Memorandum to the Federal Trade
24 Commission from Philip Morris Incorporated Concerning Implications of the Barclay Filter on

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the Commission's "Tar" Testing Program, August 18, 1981 (JD-003647); Comment by R.J. Reynolds Tobacco Company on Material Submitted to FTC by Competitive Companies Regarding Barclay Complaint, August 18, 1981 (JD-041049); Correspondence from Joseph H. Greer (Vice President and General Counsel, Liggett & Myers) to Matthew L. Myers (Attorney, Division of Advertising Practices, FTC), August 19, 1981 (JD-003648); Correspondence from Samuel B. Witt III (Vice President, Secretary, and General Counsel, R.J. Reynolds) to Matthew L. Myers, (Attorney, Division of Advertising Practices, FTC), August 20, 1981 (JD-003649); Comments on the Tobacco Industry Responses to the RJR Recommended Change in the FTC Smoking Procedure, August 19, 1981 (JD-003416); Correspondence from Ernest Pepples (Senior Vice President and General Counsel, B&W) to Matthew L. Myers (Attorney, Division of Advertising Practices, FTC), August 24, 1981 (JD-054019); Correspondence from Arnold Henson (Senior Vice President and General Counsel, American Brands) to Matthew L. Myers (Attorney, Division of Advertising Practices, FTC), August 25, 1981 (JD-003652); Correspondence from Hadrian Katz (Outside Counsel, Philip Morris) to Matthew L. Myers (Attorney, Division of Advertising Practices, FTC), August 31, 1981 (JD-003658); Correspondence from Arthur J. Stevens (Senior Vice President and General Counsel, Lorillard), to Matthew L. Myers (Attorney, Division of Advertising Practices, FTC), September 1, 1981 (JD-004620); Correspondence from Samuel B. Witt III (Vice President, Secretary, and General Counsel, R.J. Reynolds) to Matthew L. Myers (Attorney, Division of Advertising Practices, FTC), September 15, 1981 (JD-003653); Submission to the Federal Trade Commission on Behalf of Brown & Williamson Tobacco Corporation, October 23, 1981 (JD-043509).

In February 1982, Lorillard, Philip Morris and R.J. Reynolds submitted additional materials to the FTC. These submissions included additional discussion of the limitations of the FTC Method and of issues concerning compensation and vent blocking. *See* Correspondence

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1 from Michael I. Gastman (Associate General Counsel, Lorillard) to Andrew Sacks (Attorney,
2 Division of Advertising Practices, FTC), February 11, 1982 (JD-003660); "A Comparative Study
3 of the *Barclay* and *Now* Cigarettes as Smoked by Human and Machine Smokers," R.J. Reynolds
4 Tobacco Company Research & Development Department, February 16, 1982 (JD-003661);
5 Arthur D. Little Report to: Federal Trade Commission on a Review of Smoking Experiments
6 Conducted by R.J. Reynolds Tobacco Co. on Certain Ultra-Low-Tar Cigarettes, February 13,
7 1982 (JD-063500); and Memorandum of Philip Morris Incorporated to the Federal Trade
8 Commission in Reply to Questions Raised by the Commission's Staff in Connection with the
9 Investigation of the *Barclay* Filter, February 16, 1982 (JD-003659).

10 **Q. What did the FTC do to investigate the *Barclay* advertising?**

11 A. The FTC hired expert consultants to assist in the *Barclay* investigation. These experts
12 concluded that *Barclay's* unique design caused the tar delivery when smoked by a human to be
13 unavoidably higher than when smoked by the FTC machine.

14 **Q. What resulted from the FTC investigation?**

15 As a result of the FTC's investigation, the Commission sued B&W, withdrew its tar rating for
16 *Barclay*, and determined that *Barclay* advertisements could no longer carry the FTC's 1 mg
17 rating. The FTC believed that the *Barclay*'s misranking threatened the integrity of the FTC
18 testing system.

19 **Q. What steps did the FTC initially want B&W to take with its reported tar yields from**
20 ***Barclay*?**

21 A. The FTC suggested that B&W report an estimated yield of 3 to 7 mg tar for *Barclay*.
22 However,

23 B&W declined the FTC's suggestion .... B&W did, however, revise its fine-print
24 tar and nicotine legend to refer to a "recognized method used by B&W and

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> supported by independent laboratories" rather than, as previously, referring to "the FTC Method."

FTC v. Brown & Williamson Tobacco Corporation, 778 F.2d 35, 38 (footnote omitted) (D.C. Cir. 1985) (JD-061549).

Q. Did the FTC respond to this action by B&W?

A. Yes. The FTC again sued B&W to enjoin it from continuing to advertise *Barclay* as "1 mg tar," alleging that the advertising was false and deceptive. *FTC v. Brown & Williamson Tobacco Corporation,* 580 F. Supp. 981, 987 (D.D.C. 1983) (JD-003926). The FTC also alleged that *Barclay*'s "99% tar free" claim was illegal, concluding that the claim falsely implied that *Barclay* is virtually tar free. *FTC v. Brown & Williamson Tobacco Corporation,* 580 F. Supp. 981, 984 (D.D.C. 1983) (JD-003926). The court upheld the FTC's challenge of *Barclay* "1 mg tar" advertisements. *FTC v. Brown & Williamson Tobacco Corporation,* 580 F. Supp. 981, 990 (D.D.C. 1983) (per Gesell, J.) (JD-003926).

The court overturned the FTC's finding that *Barclay*'s "99% tar free" claim was deceptive, based on consumer-survey evidence showing that the claim did not imply more than the product was "low delivery," or that *Barclay* delivered 1 mg tar (or any other specific tar rating). It found:

> The evidence clearly shows that consumers do not perceive the "99% tar free" claim as an assertion that Barclay has a particular milligram rating, even when accompanied by a specific milligram rating as in the current advertisement. Indeed, consumers have difficulty even relating the claim to any milligram number. Furthermore, there is little support for the FTC's view that consumers understand the claim to assert that Barclay is among the lowest-rated cigarettes. Even the FTC's own consumer survey suggests that the overwhelming majority of consumers perceive "99% tar free" as a general low tar claim.

FTC v. Brown & Williamson Tobacco Corporation, 580 F. Supp. 981, 989-90 (D.D.C. 1983) (footnote omitted) (JD-003926).

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The court's decision provided guidance to the cigarette companies regarding the appropriate use of "low tar" claims. The court also enjoined B&W from reporting any test results for *Barclay* unless they were based on an FTC-approved system.

Q. Did B&W appeal this decision?

A. Yes.

Q. What happened in that appeal?

A. The appeals court generally upheld the district court's decision, but restricted the court's injunctive relief and did not require B&W only to use an FTC approved test method:

> We do not wish to leave intact the injunction's requirement of prior FTC approval of such advertising because that would enshrine the current FTC system as the sole legitimate testing method, even though it was not passed pursuant to [the Trade Regulation Rule provisions of the FTC Act] … and subjected to the possibility of judicial review. Thus we remand this case to the district court with instructions to modify the injunction to allow for the presentation of the results of a different testing system, so long as any advertisement of such results provides sufficient data to avoid deceptiveness due to confusion with the FTC testing system. It hardly requires saying that the FTC would remain free to prove deceptiveness due to the inadequacy of the new testing system or the form of the advertisements under section 5 of the FTC Act. The Commission may, of course, address the problem by promulgating a Trade Regulation Rule …."

FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 45 (D.C. Cir. 1985) (JD-061549).

Q. How did B&W respond to this decision?

A. B&W did not attempt to develop or use an alternative test method for *Barclay*. In addition, given the FTC's policy since the 1960s that it considered non-standardized test methods confusing to consumers, B&W had every reason to expect that the Commission would take action under section 5 of the FTC Act if the company attempted to report results from an alternative test method.

B&W responded to the *Barclay* decision by redesigning the cigarette so that it was not incompatible with the FTC Method, and the FTC again reported test results for the product. *See*

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"Tar", Nicotine and Carbon Monoxide of the Smoke of 272 Varieties of Domestic Cigarettes, Federal Trade Commission, December 1988, p. 8 (JD-004549). The redesigned *Barclay* yielded 3 mg tar (85 mm) and 5 mg tar (100 mm) using the FTC Method.

Q. Were descriptors addressed in the *Barclay* case?

A. The appeals court in the *Barclay* case also addressed the issue of descriptors. Again, the court agreed that *Barclay*'s tar rating should be 3 – 7 mg, but also determined that B&W was free to advertise *Barclay* as "ultra low tar." *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 39 (D.C. Cir. 1985) (JD-061549). The appeals court decision provided guidance to the cigarette companies regarding acceptable use of "low tar" claims.

Q. During the *Barclay* matter, did the cigarette companies address filter ventilation issues with the FTC?

A. In their comments submitted to the FTC during the *Barclay* investigation, the cigarette companies reminded the FTC that ventilated filtration is the principal means used to reduce tar yields. In particular, Philip Morris stated:

> [T]he principal determinant of the "tar" level of a given "low tar" cigarette is dilution – the greater the volume of dilution, the lower the "tar" yield…. In most cigarettes, there is some "dilution" or "ventilation" of the smoke with air taken through the filter wrapping. The amount of dilution varies from brand to brand, and … is a significant determinant – indeed, it is the <u>most</u> significant determinant – of a "low tar" brand's measured "tar" delivery.

Memorandum to Federal Trade Commission from Philip Morris Incorporated Concerning Barclay Cigarettes and a Proposed Change in the Apparatus Used in the Commission's Laboratory for Testing "Tar" Delivery, July 10, 1981, pp. 2, 6 (emphasis in original) (JD-040728).

Q. During the *Barclay* matter, did the cigarette companies address ventilation holes and compensation with the FTC?

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A. Yes. The cigarette companies reminded the FTC that ventilation holes have a substantial impact on machine-measured deliveries. *See* Correspondence from Martin London (Outside Counsel, B&W) to Matthew L. Myers (Attorney, Division of Advertising Practices), July 16, 1981, p. 3, Figure 1 (JD-003643); Correspondence from Jerome I. Chapman (Outside Counsel, Philip Morris) to Matthew L. Myers (Attorney, Division of Advertising Practices, FTC), July 17, 1981, p. 2 (JD-043496); and Comment by R.J. Reynolds Tobacco Company on Material Submitted to FTC by Competitive Companies Regarding Barclay Complaint, August 18, 1981, p. 1 (JD-041049). In addition, the companies reminded the FTC about compensation and, in particular, vent blocking. Liggett & Myers told the Commission:

> After conferring with our Research Director and reviewing various studies in the literature relating to cigarette testing, we are firmly convinced that it is impossible to define a "normal human smoker" or a "normal human puff" of a cigarette for the purpose of constructing a representative testing machine holder, mush less a cigarette machine which would equate with human smoking. For instance, velocities, puff durations and puff volumes vary significantly from smoker to smoker. In view of such variations and particularly with the low "tar" and ultra low "tar" cigarettes in today's market which utilize various methods of air filtration, the puff characteristics of such systems can show even greater variances depending on how the smoker handles his or her cigarette. In addition, the smoke yield of air-diluted cigarettes can be significantly affected by such factors as lip pressure, lip positioning and by the positioning of the fingers holding the cigarette.

Correspondence from Joseph H. Greer (Vice President and General Counsel, Liggett & Myers) to Matthew L. Myers (Attorney, Division of Advertising Practices, FTC), August 19, 1981, p. 1 (JD-003648).

Brown & Williamson elaborated that the way a cigarette is smoked influences its delivery:

> All people are able to affect the performance of a cigarette by modifying their smoking behavior, i.e., formation of lips, puff size, etc.... Every ultra-low cigarette incorporates mechanical features designed to deliver rich taste with low "tar." But it is well known that smokers, in an effort to achieve more satisfaction, can attempt to subvert those features of any filter that were designed to keep its

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> delivery in the ultra-low range. Occlusion, if it occurs at all, is only one maneuver that smokers may perform to obtain higher delivery than intended. Other maneuvers we know smokers use include increasing puff volume, puff frequency, puff duration and depth of inhalation.

Submission to the Federal Trade Commission on Behalf of Brown & Williamson Tobacco Corporation, October 23, 1981, pp. 14, 41 (footnote omitted) (JD-043509).

Q. Were different test methods considered by the FTC during the *Barclay* investigation?

A. Yes. Various alternative testing methods to estimate actual smoker tar intake were used during the *Barclay* investigation. The cigarette companies as well as the FTC's own experts discussed the details of, and the test results derived from, these different test methods. These methods included analysis of dilution using Philip Morris' Puff Parameter Analyzer, the analysis of constituent retention in smoked cigarette butts, and the analysis of cotinine levels in the plasma of smokers.

Q. What was Philip Morris' Puff Parameter Analyzer, as you understand it?

A. Philip Morris developed a machine, the Puff Parameter Analyzer ("PPA") that measured the level of dilution by actual smokers, a primary method of reducing tar yields in cigarettes. During the *Barclay* investigation, Philip Morris conducted in-house tests and also commissioned the U.S. Testing Company to conduct tests using the PPA. Philip Morris disclosed the details of how the PPA worked and the test results to the FTC. *See* Memorandum to the Federal Trade Commission from Philip Morris Incorporated Concerning Barclay Cigarettes and a Proposed Change in Apparatus Used in the Commission's Laboratory for Testing "Tar" Delivery, Philip Morris Research Center, July 10, 1981 [1002353906] – [1002353936] (JD-040728); Memorandum of Philip Morris Incorporated to the Federal Trade Commission in Reply to

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1 Questions Raised by the Commission's Staff in Connection with the Investigation of the Barclay
2 Filter, Philip Morris Research Center, February 16, 1982 (JD-003659).

3 **Q. Did the FTC look at constituent retention in smoked cigarette butts during *Barclay*?**

4 A. Yes. Evidence derived from analyzing constituent retention in smoked cigarette butts
5 was conducted and presented to the FTC during the *Barclay* investigation. Philip Morris
6 conducted tests that measured the nicotine retained in smoked cigarette butts. Using these data,
7 along with the estimated nicotine filtration efficiency and the tar to nicotine ratio of the tested
8 cigarette, Philip Morris estimated smoker tar intake. Philip Morris disclosed to the FTC the
9 details explaining this methodology, along with test results comparing *Barclay* with Philip
10 Morris' *Cambridge* and *Merit* cigarettes. Brown & Williamson also conducted cigarette butt
11 analysis and submitted the results to the FTC. *See* Submission to the Federal Trade Commission
12 on Behalf of Brown & Williamson Tobacco Corporation, p. 20, October 23, 1981 (JD-043509).

13 **Q. Did the FTC look at cotinine levels in the *Barclay* investigation?**

14 A. Yes. During the *Barclay* investigation, Brown & Williamson commissioned studies that
15 measured the level of cotinine, a metabolite of nicotine, in smokers' plasma. If cotinine levels in
16 smoker plasma are correlated with tar intake, then smoker tar intake can be estimated. Brown &
17 Williamson submitted to the FTC the details of its cotinine studies comparing *Barclay* with
18 Philip Morris' *Cambridge*, American Brands' *Carlton*, and R.J. Reynolds' *Now*.

19 **Q. Did the FTC seek comments on other testing changes during *Barclay*?**

20 A. During the *Barclay* investigation the FTC announced that it was seeking comment on
21 "possible new testing procedures," whether it "[s]hould … examine smoking behavior, such as
22 hole blocking," and whether "smokers use higher 'tar' cigarettes differently than lower 'tar'
23 cigarettes." "FTC Determines Its Smoking Machine Does Not Accurately Test Barclay's 'Tar,'
24 Nicotine and Carbon Monoxide," *FTC News*, April 13, 1983 (JD-041479).

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1 **Q. What comments did the cigarette companies submit in response to this FTC**
2 **request?**
3 A. The cigarette companies provided additional materials in response to the FTC's request
4 and provided recommendations regarding potentially changing the testing method in general and
5 potentially changing the testing method to more accurately measure *Barclay* cigarettes
6 specifically. *See* Correspondence from Arthur Stevens (Senior Vice President and General
7 Counsel, Lorillard), to Judith P. Wilkenfeld, (Attorney, Bureau of Consumer Protection, FTC),
8 June 27, 1983 (JD-003667); Comments of Philip Morris Incorporated on Proposed Modifications
9 to the FTC Method for Ranking the "Tar" Deliveries of Cigarettes, June 30, 1983 (JD-003619);
10 Response by R.J. Reynolds Tobacco Company ("RJRTC") to the Federal Trade Commission's
11 April 13, 1983, Request for Comment on Possible Modifications to the Commission's Present
12 Cigarette Testing Methodology, June 30, 1983 (JD-063526); In Re FTC Request for Comments
13 on Possible Modifications to the Commission's Present Cigarette Testing Methodology (Liggett
14 & Myers), June 30, 1983 (JD-004622); Comments of Brown & Williamson Tobacco Corporation
15 on the Federal Trade Commission's Proposal to Modify the Official Cigarette Testing
16 Methodology (48 Federal Register 15953), June 30, 1983 (JD-003669); Correspondence from
17 Ronald S. Goldbrenner (Associate General Counsel, Lorillard) to Judith P. Wilkenfeld (Attorney,
18 Bureau of Consumer Protection, Attorney), July 13, 1984 (JD-004621).
19 **Q. Did the cigarette companies make recommendations for modifying the FTC method**
20 **in the context of the Barclay investigation?**
21 A. Yes, and the recommendations for modifying the FTC Method varied across companies.
22 R.J. Reynolds recommended changing the FTC Method, saying:
23 RJRTC does take the position, however, that either of the PM modifications or the
24 Copeland holder (a device presently being considered by Swiss authorities) would

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> adequately remedy the problem created in cigarette testing by 'bypass' filters of the Barclay-type.
>
> . . . .
>
> RJRTC contends that if the Commission were to adopt one of the proposed holder modifications, then the integrity of the Commission's program would be restored. RJRTC maintains that no other change to the Commission's testing program is needed.

Response by R. J. Reynolds Tobacco Company ("RJRTC") to the Federal Trade Commission's April 13, 1983, Request for Comment on Possible Modifications to the Commission's Present Cigarette Testing Methodology, [2023101474] – [2023101475] (JD-063526).

Philip Morris agreed with Reynolds that *Barclay* was incorrectly measured by the FTC Test Method, and recommended changing the cigarette holder:

> The Commission should promptly modify the FTC method of testing the relative "tar," nicotine and carbon monoxide deliveries of cigarettes by adopting the adapter to the current Cambridge holder submitted by Philip Morris. This simple, efficient modification adds to the other established standardized parameters a standardized lip, and thereby plugs the loophole in the current protocol which has been exploited by the Barclay and Kool Ultra cigarette brands. In light of the Commission's extensive and thorough investigation of the Barclay-type filter, and its determination that the current testing methodology does not accurately assess cigarettes fitted with this filter, the proposed modification is urgently needed to restore the integrity of the Commission's cigarette testing program.

Comments of Philip Morris Incorporated on Proposed Modifications to the FTC Method for Ranking the "Tar" Deliveries of Cigarettes, June 30, 1983, pp. 24-25 (JD-003619).

Lorillard recommended adoption of the Philip Morris holder:

> In our September 1, 1981 response to the Commission on the Barclay matter, we suggested that these products be assessed using the holder that has been proposed by Philip Morris. This holder blocks the air dilution channels located on the outer periphery of the cigarette construction but does not alter the results obtained from other cigarette constructions. We continue to believe that this is the most practical and realistic method of assessing filter constructions where the air filtration system will be blocked inadvertently by the lips.

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Correspondence from Arthur J. Stevens (Senior Vice President and General Counsel, Lorillard) to Judith P. Wilkenfeld (Attorney, Bureau of Consumer Protection, Federal Trade Commission), June 27, 1983 (JD-003667).

In contrast to R. J. Reynolds, Philip Morris, and Lorillard, Liggett & Myers' recommended no change in the FTC testing method. Liggett & Myers informed the FTC that it believed no changes should be made to the FTC Test Method and that the FTC Test Method accurately measured *Barclay*'s tar and nicotine rating:

> [T]he current FTC testing methodology accurately places Barclay in the same category as Cambridge, Now and Carlton.
>
> . . . .
>
> In short, the existing FTC testing methodology appears to accurately measure nicotine intake -- at least for nominally low-yield cigarettes. No cotinine research undertaken by anyone indicates to the contrary. Instead, we submit that the only basis which the FTC has for believing that Barclay is inaccurately ranked is the intuitive feeling that Barclay must have a higher tar and nicotine yield than the other ultra-low tar and nicotine cigarettes because (i) it tastes better and (ii) admittedly artificial, and thus unreliable, ventilation studies submitted to the FTC by Reynolds and Philip Morris suggest Barclay may be misclassified. Changes in the FTC testing methodology which could have profound adverse effects on competition should not be based on intuitive feelings or research proffered by the dominant competitors in the industry.

In Re FTC Request for Comments on Possible Modifications to the Present Cigarette Testing Methodology (Liggett & Myers), June 30, 1983, p. 6, 8-9 (JD-004622).

Brown & Williamson also recommended no change to the FTC Method. Brown & Williamson recommended the retention of the current testing system in addition to creating a banding system and providing a disclaimer informing consumers that the amount of tar and nicotine they receive depends on how they smoke:

> We respectfully suggest, therefore, that, if the Commission is determined to take some immediate action, the only solution that is fair and not misleading to consumers is retention of the current FTC method, combined with the adoption of a banding system and an EPA-type notice with respect to FTC "tar" and nicotine

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numbers, i.e., that smokers may get more or less than test values, depending on how they smoke any brand.

Comments of Brown & Williamson Tobacco Corporation on the Federal Trade Commission's Proposal to Modify the Official Cigarette Testing Methodology (48 Federal Register 15953), June 30, 1983, p. 53 (JD-003669).

Q. Did public health organizations also submit comments concerning the FTC Method in response to the FTC's request stemming from *Barclay*?

A. Yes, public health organizations submitted comments, and pointed out the limitations of the FTC Method. *See* Comments of the American Lung Association and the American Thoracic Society, February 15, 1984 (JD-004623); Comments of the American Heart Association, May 18, 1984 (JD-004624).

Q. What resulted from the FTC request and the comments it received?

A. In October of 1985, the FTC came forward with a recommendation consisting of "new procedures … designed to identify and measure accurately those cigarettes which cannot be tested satisfactorily by the current method." "FTC Proposes New Procedures for Cigarette Testing Methodology; Seeks Public Comment on Proposals," *FTC News*, October 8, 1985 (JD-003670).

Q. What did the FTC ultimately decide?

A. The Commission announced that it was not implementing the new procedures, but instead wished to receive comments and proposed alternatives.

Q. Did the FTC implement any of these proposed changes to its test method?

A. To date, the FTC has never implemented any of the proposed changes. The FTC has stated repeatedly that "[a]lthough there have been several adaptations offered for the testing methodology, none have proven to be satisfactory." *"Tar," Nicotine and Carbon Monoxide of*

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the Smoke of 370 Varieties of Domestic Cigarettes, 1990, p. 8 (JD-004378); *Tar, Nicotine and Carbon Monoxide of the Smoke of 475 Varieties of Domestic Cigarettes,* 1991, p. 8 (JD-003551); *Tar Nicotine and Carbon Monoxide of the Smoke of 568 Varieties of Domestic Cigarettes,* 1993, p. 9 (JD-044571); *Tar Nicotine, and Carbon Monoxide of the Smoke of 1107 Varieties of Domestic Cigarettes,* 1995, p. 9 (JD-004388).

This was the second time the FTC considered changes to the FTC Method, the first being the Lorillard request to change the insertion depth. Nevertheless, according to the FTC's Lee Peeler:

> In neither instance … did the information received by the Commission form a sufficient basis for changing the protocol, even though the limitations on the predictiveness of the FTC method caused by compensatory smoking, were clearly recognized by the mid-1980's.

Statement of C. Lee Peeler (Associate Director, Division of Advertising Practices, FTC), Conference on: The FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Levels in Cigarettes, Transcript of Proceedings, December 5, 1994, p. 7 (JD-004327).

The FTC did not modify its test method, and the cigarette companies continued to use FTC Method results in their advertisements.

Q. In testimony before this court, Dr. David Burns contended that the cigarette companies did not "voluntarily provide the public health agencies of the U.S. Government with any information about the elasticity of delivery." Written Direct Testimony of Dr. David Burns, at 47-48. Based on your review of the *Barclay* investigation, did the cigarette companies voluntarily provide the FTC with information about the "elasticity of delivery"/ "compensation?"

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A. Yes. During the *Barclay* investigation, the FTC considered a substantial amount of information regarding compensation issues, and much of this information was discussed in various cigarette company submissions to the Commission.

Q. Dr. Burns also testified that the cigarette companies had information regarding compensation issues that was not made available to the authors of the 1981 Surgeon General's Report, and according to Dr. Burns, had this information been made available, the authors of the Surgeon General's Report would not have advised smokers, who could not quit, to smoke low yield cigarettes. Burns Written Direct Testimony, at 55-56. Do you agree with Dr. Burns' opinion on this issue?

A. I am not a medical scientist, however, I do know that despite the extensive consideration of compensation issues in the *Barclay* investigation, the Public Health Service continued to advise smokers who could not quit to smoke low yield cigarettes.

Q. Is the Public Health Service the same branch of the Department of Health and Human Services that publishes the Surgeon General's reports?

A. Yes.

H. 1992 – Coalition on Smoking OR Health Petition to FTC on Low Tar Cigarette Marketing

Q. Has the FTC conducted general investigations of low tar cigarettes?

A. Yes. In 1992, an anti-tobacco organization, the Coalition on Smoking OR Health, petitioned the FTC, alleging that "[c]onsumers are being misled by advertising such as that presented by Philip Morris, U.S.A. with regard to *Merit 'Ultima'* and other low tar cigarettes." Coalition on Smoking OR Health, Petition before the Federal Trade Commission, 1992, p. 5 (JD-041048). The Coalition's petition requested that the FTC find that advertising for low tar cigarettes is deceptive, and that the FTC

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> [o]rder that Philip Morris, U.S.A. and other tobacco companies immediately cease and desist in advertising lower yield tobacco products in any manner which implies that these products will reduce a consumer's health risk from tobacco use….

Id. at 3.

The Coalition specifically alleged that

> although switching … to lower yield filter cigarettes appears somewhat to reduce the risk of lung cancer, the benefits of smoking lower yield cigarettes are minimal compared with giving up smoking entirely and … [s]witching to low-yield brands may even increase the health risk for smokers who compensate for reduced nicotine intake by increasing the number of cigarettes smoked per day, the frequency of puffing, and the depth and duration of inhalation. Therefore, the package labels and advertisements for … low-yield cigarettes … are false and misleading.

Id. at 2.

Q. Did the FTC open an investigation?

A. Yes, the FTC opened an investigation to examine the allegations contained in the Coalition's petition. Correspondence from John D. Graubert (Deputy General Counsel, FTC) to Lucia M. Valente (Counsel to the Attorney General, New York Office of the Attorney General), September 10, 1998 (JD-004572). As part of this investigation, FTC economist Joseph Mulholland undertook an analysis of compensation issues as well as consumer perceptions of "low tar"/ "light" cigarettes. Deposition of Joseph P. Mulholland, *United States v. Philip Morris, Inc., et al.,* September 4, 2002, pp. 130-142, 251-253.

Q. Could you explain the findings of Dr. Mulholland?

A. The results of this analysis are contained in Dr. Mulholland's paper, "Behavior and Risk Perception among Smokers of Low-Yield Cigarettes: An Analysis of the 1986 Adult Use of Tobacco Survey":

> [The] report … analyzed returns from the 1986 Adult Use of Tobacco Survey in an attempt to understand the influence of low-tar cigarettes on smoking behavior and on attitudes toward smoking risk. The principal finding is that neither

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> smoking behavior nor perceptions about smoking risk appear to be systematically related to the tar level of a smoker's current brand of cigarette.
>
> The study of how individuals smoke focused on an evaluation of the proposition that individuals choosing lower tar cigarettes smoke more of them in order to compensate for the reduced nicotine content of such products. Empirical analysis generally failed to support this argument.
>
> … Analysis of brand switching activity shows a somewhat more systematic compensation effect in that the magnitude of tar reduction due to a change in brands is associated with an increased tendency to smoke more cigarettes. This tendency toward greater consumption is not significantly related to the tar content of the brand a smoker changes to, however. Thus smokers switching to the low-tar brands are no more likely to increase their smoking rate than are those who achieve the same tar reduction by switching to brands in the higher tar categories.
>
> The investigation of how individuals view smoking risk sought to evaluate concerns that the availability and promotion of low-tar brands serves to lull the users of such products into underestimating smoking risk. The results suggest significant resistance to the idea of a "less hazardous" cigarette based on lowered amounts of tar and nicotine. Among users of low-tar brands (<=15 mg), only 45% state that their current brand exhibits lower than average risk. This rate is predictably higher for lower tar brands, but even for the lowest tar group (<=3 mg), 43.3% do not attribute a risk advantage to their brand.
>
> Variables based on the respondents' attitudes and beliefs were developed to evaluate the larger issue of how low-tar smokers perceive total smoking risk. Tests based on the degree of concern expressed by smokers about the adverse health effects to them from smoking show no tendency for low-tar users to be less concerned than those smoking the higher tar brands. Similarly, users of low-tar brands are not in general less likely to attempt quitting cigarettes in the future than are those smoking the higher tar varieties.

Mulholland, Joseph P., "Behavior and Risk Perception Among Smokers of Low-Yield Cigarettes: An Analysis of the 1986 Adult Use of Tobacco Survey," August 4, 1992, pp. 67-68 (JD-004335).

Q. Did Dr. Mulholland do any further analysis of this data?

A. In 1993, Dr. Mulholland conducted further analysis of the 1986 Adult Use of Tobacco Survey. The results of this work were outlined in his paper, "Risk Perceptions of Low-Tar Cigarettes." In this subsequent paper, Dr. Mulholland wrote the following:

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> [M]y empirical analysis finds little systematic relationship between tar choice and either risk perception or entry/exit behavior of the sort predicted by the risk underestimation hypothesis…. The one pattern that is the closest to the risk underestimation view is the NO QUIT results for male smokers. Here smokers of the ultra-low-tar brands exhibit a greater tendency to express the NO QUIT position than do others smoking brands with tar levels below 15 mg. Yet the differences are small and are statistically insignificant.
>
> Brands at the low end of the tar spectrum are not especially popular among new starts while those who quit do not differ appreciably in their tar choice from those who remain smokers. The analysis of quitting behavior also casts doubt on arguments that low-tar brands tend to reduce aggregate smoking levels by allowing smokers to gradually reduce their dependence on nicotine and thus make it easier for them to quit altogether.

Mulholland, Joseph P., "Risk Perceptions of Low-Tar Cigarettes," June 6, 1993, pp. 12-13 (emphasis in original) (JD-003510).

Q. What did the FTC do based on its investigation of low tar cigarette marketing?

A. The FTC closed its investigation on August 8, 1994. Correspondence from John D. Graubert (Deputy General Counsel, FTC) to Lucia M. Valente (Counsel to the Attorney General, New York Office of the Attorney General), September 10, 1998 (JD-004572).

Q. What did the FTC decide to do about its policy on the marketing of low-yield cigarettes?

A. The FTC did not change its policy regarding the marketing of low-yield cigarettes.

I. 1994 – FTC Request For Recommendations on Changing its Tar And Nicotine Testing Method and The National Cancer Institute's Monograph 7

Q. Are you aware that an NCI expert committee met in December of 1994 to discuss issues concerning the FTC method and potential changes to the FTC method?

A. Yes.

Q. And, ultimately, the report of that NCI expert committee became NCI Monograph 7, which was published in 1996, correct?

A. Yes.

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Q. Why was the expert committee asked to meet?

A. During the 1980s and early 1990s, questions were growing abut the usefulness and validity of the FTC method. In June of 1994, the Chairman of the House Subcommittee on Health and the Environment wrote to the Director of NCI asking him to convene a meeting of experts to review and make recommendations concerning the accuracy and appropriateness of the FTC test. A similar request was received from the FTC Chairman outlining areas that the FTC wanted the committee to address.

Q. What issues did the FTC ask the NCI committee to address in 1994?

A. The FTC raised several questions that it wanted the NCI committee to address in 1994. These questions included the following:

> [T]o what extent are the tar and nicotine ratings of cigarettes produced by the current testing protocol predictive of how much of those substances smokers actually get when smoking cigarettes?
>
> [D]o smokers of lower tar cigarettes engage in compensation behavior?
>
> [W]hat are the compensation mechanisms (e.g., smoke more cigarettes, inhale deeper, block aeration holes)?
>
> [W]hat is the overall magnitude of the compensation effect? …
>
> [D]oes the magnitude or existence of the compensation effect vary significantly according to the tar/nicotine levels of lower tar cigarettes (15 mg. or less)? …
>
> [I]s there any evidence on the ability of smokers to modify their smoking technique after the effects of compensatory smoking are pointed out to them? …
>
> [I]f the current cigarette testing protocol needs to be revised, can it be modified to reflect actual smoking more accurately (including the effects of compensatory smoking behavior)? …
>
> [A]re low-tar cigarettes (cigarettes rated at 15 mg. or less of tar) less dangerous than high-tar cigarettes (those rated at more than 15 mg. of tar) and, if so, what is the extent of their health benefit?
>
> [A]re ultra low-tar cigarettes (cigarettes rated at 6 mg. or less of tar) less dangerous than low-tar and/or high-tar cigarettes and, if so, what is the extent of their health benefit?

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Correspondence from Janet D. Steiger (FTC, Chairman) to Samuel Broder (National Cancer Institute, Director), July 20, 1994 (JD-041571).

Q. What were the conclusions of the NCI Committee?

A. The NCI committee came to the following conclusions:

> The smoking of cigarettes with lower machine-measured yields has a small effect in reducing the risk of cancer caused by smoking, no effect on the risk of cardiovascular diseases, and an uncertain effect on the risk of pulmonary disease. A reduction in machine-measured tar yield from 15 mg tar to 1 mg tar does not reduce relative risk from 15 to 1. …
>
> The FTC test protocol was based on cursory observations of human smoking behavior. Actual human smoking behavior is characterized by wide variations in smoking patterns which result in wide variations in tar and nicotine exposure. Smokers who switch to lower tar and nicotine cigarettes frequently change their smoking behavior which may negate potential health benefits. …
>
> There should be federal agency oversight of cigarette testing ….
>
> The questions involved in the purpose, methodology, and utility of the FTC protocol are complex medical and scientific issues that require ongoing involvement of federal health agencies, including the National Institutes of Health, the Food and Drug Administration, and the Centers for Disease Control. …
>
> When a cigarette manufacturer makes significant changes in cigarette design that affect yields, it should notify the appropriate federal agency. …
>
> Information from the testing system is useless to smokers unless they have ready access to it. The information from the testing system should be made available to all smokers, including those who smoke generic brands and other brands not widely advertised. …
>
> Brand names and brand classifications such as "light" and "ultra light" represent health claims and should be regulated and accompanied, in fair balance, with an appropriate disclaimer. …
>
> The available data suggest that smokers misunderstand the FTC test data. This underscores the need for an extensive public education effort.

Statement from the Ad Hoc Committee of the President's Cancer Panel to Consider the FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Levels in Cigarettes, December 6, 1994 (emphasis in original) (JD-040636).

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Q. Did the NCI committee make recommendations regarding the FTC Method?

A. Yes, the NCI committee also made recommendations regarding the FTC Method.

> This system should also measure and publish information on the range of Tar, Nicotine, and Carbon Monoxide yields that most smokers should expect from each cigarette sold in the U.S. …
>
> This information should be clearly communicated to smokers. …
>
> A simple graphic representation should be provided with each pack of cigarettes sold in the U.S. and in all advertisements. The representation should not imply a one-to-one relationship between measurements and disease risk. …
>
> The system must be accompanied by public education to make smokers aware that individual exposure depends on how the cigarette is smoked and that the benefits of switching to lower yield cigarettes are small compared to quitting. …
>
> [I]n order to avoid confusing smokers, no smoke constituents other than tar, nicotine, and carbon monoxide [should] be measured and published at the present time. Smokers should be informed of the presence of other hazardous smoke constituents with each package and with all advertisements. These constituents should be classified by toxic effects.

Statement from the Ad Hoc Committee of the President's Cancer Panel to Consider the FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Levels in Cigarettes, December 6, 1994 (JD-040636).

Q. Did the FTC change the FTC Method at this time?

A. The FTC did not decide to change the FTC Method or the disclosure requirements.

Q. Did the cigarette companies continue to use FTC Method results in their advertisements?

A. Yes. The cigarette companies continued to test and publish FTC Method results in their advertisements as required by the FTC.

J. <u>1995 – Carlton</u>

Q. During the 1990s, did individual cases continue to arise regarding the FTC's tar and nicotine policy and compensation?

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A. Yes. For example, the FTC investigated the American Tobacco Company's *Carlton* brand.

Q. Could you explain the issues in the *Carlton* case?

A. During the first half of the 1990s, American Tobacco was competing vigorously in the ultra-low tar category, marketing a 1-mg tar cigarette, *Carlton*. American ran print advertisements claiming: (1) "10 packs of *Carlton* have less tar than 1 pack of [various competitors'] brands"; (2) "a whole carton of *Carlton* has less tar than 1 pack of [various competitors'] brands"; and (3) "10 to 1. 10 packs of *Carlton* have less tar than 1 pack of [various competitors'] brands." *In the Matter of American Tobacco Co.,* 119 F.T.C. 3 (1995) (JD-063604). The basis for these comparisons were FTC Method results.

Q. What action did the FTC take?

A. The FTC filed a complaint against American, claiming that the *Carlton* ads were deceptive due to the existence of compensatory smoking behavior. According to the FTC:

> [C]onsumers will not necessarily get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads. Although the cigarettes depicted are rated as having more than 10 mg. of tar, those ratings are obtained through smoking machine tests that do not reflect actual smoking, in part because the machines do not take into account such behavior as compensatory smoking.

In the Matter of American Tobacco Co., 119 F.T.C. 3 (1995) [JD-063604].

The FTC took issue with the *Carlton* ads because they implied that the actual amount of tar ingested when smoking *Carlton* cigarettes relative to smoking competitors' brands was a specific ratio based on machine-measured yields.

Q. Was a consent order issued in this case?

A. American agreed to a consent order in the case barring it from: (1) "representing … that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar

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than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar"; and (2) "representing … that consumers will get less tar or nicotine by smoking any number of cigarettes … of any of [American's] brands than by smoking one or more cigarettes … of any other brand, unless such representation is true and, at the time of making such representation, [American] possesses and relies upon competent and reliable scientific evidence that substantiates the representation." *In the Matter of American Tobacco Co.,* 119 F.T.C. 3 (1995) (JD-063604).

Q. Were descriptors addressed in this case?

A. Yes, the FTC explicitly allowed the use of descriptors:

> That presentation of the tar and/or nicotine ratings of any of [American's] brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that [American's] brand is "low," "lower," or "lowest" in tar and/or nicotine) shall not be deemed … to violate … this order where no more than a single cigarette or pack of [American's] brand is visually depicted versus a single cigarette or pack of any other brand.

In the Matter of American Tobacco Co., 119 F.T.C. 3 (1995) (JD-063604).

Q. How did these actions affect the use of descriptors?

A. In connection with the *Carlton* enforcement action, the FTC continued to permit comparative "tar" claims and the use of descriptors such as "low," "lower," and "lowest," and some of the defendant cigarette manufacturers continue.

Q. How are the issues of the *Carlton* case related to the FTC's substantiation policy and the Cigarette Advertising Guides?

A. The principals that are outlined in the *Carlton* consent order are consistent with the FTC's substantiation policy and the Cigarette Advertising Guides, and was specifically based on the potential for smoker compensation.

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K. 1997 – 1998 – FTC'S Consideration of Changes to its Test Method and "Low Tar" / "Lights" Policy and the Cigarette Companies' Response

Q. Dr. Langenfeld, has the FTC continued to examine the efficacy of its tar and nicotine Test Method?

A. Yes. In 1997, the FTC announced a proposal for a revised testing method and requested public comment. *See* "FTC Proposes New Method for Testing Amounts of Tar, Nicotine, and Carbon Monoxide in Cigarettes," *FTC Press Release*, September 9, 1997 (JD-002497); 62 Fed. Reg. 48158, September 12, 1997 (JD-040038). The proposed revisions included a two-tier testing method:

> 1. All current procedures for the collection, storage, and conditioning of cigarettes would remain in place, except that the 100 cigarettes selected for testing would be randomly divided into two groups of 50 cigarettes each.
>
> 2. 50 cigarettes of each variety would be tested under the conditions called for by the current FTC test method (i.e., a 2.0 second, 35 milliliter puff every 60 seconds).
>
> 3. 50 cigarettes of each variety would be tested under conditions identical to those currently used, except that smoking machines would be calibrated to take a puff of 2.0 seconds duration and 55 milliliters volume every 30 seconds.
>
> The puffing parameters used in the current test method would be retained as the less intensive of the two testing conditions. Retaining these parameters would preserve the historical continuity of the existing test method, and thus permit long term trends in ratings to be identified.

See 62 Fed. Reg. 48158, September 12, 1997 (JD-040038).

In addition, the Commission raised the following questions:

> Is there a need for official guidance with respect to the terms used in marketing lower rated cigarettes?
>
> … Do consumers believe they will get significantly less tar from cigarettes described as "light" or "low tar" than from regular or full flavor cigarettes, and do they believe they will get significantly less tar from cigarettes described as "ultra

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> low tar" or "ultra light" than from "light" or "low tar" cigarettes? Do the descriptors convey implied health claims?

62 Fed. Reg. 48158, September 12, 1997 (JD-040038).

Q. Did the FTC consider disclosures to accompany FTC tar and nicotine numbers in cigarette advertising?

A. The FTC also asked for comment on potential disclosures to accompany the FTC tar and nicotine test results in cigarette advertising:

> There's no such thing as a safe smoke. Even cigarettes with low ratings can give you high amounts of tar and nicotine. It depends on how you smoke….
>
> How much tar and nicotine you get from a cigarette depends on how intensely you smoke it.

62 Fed. Reg. 48158, September 12, 1997, Attachments A & B (JD-003507).

Q. What comments did the FTC receive from public health agencies?

A. The FTC received comments from various sources including public health agencies. These agencies urged the Commission not to revise the FTC Method at that time:

> Comments submitted by public health agencies urged the Commission to postpone revisions until a broader review of unresolved scientific issues surrounding the system could be addressed.

"Statement of the Federal Trade Commission's Bureau of Consumer Protection On the National Cancer Institute's Report on Cigarette Testing Method," *FTC Press Release*, November 27, 2001 (JD-004402).

Q. What has resulted from this latest reconsideration by the FTC?

A. The FTC has not, to date, changed its testing method, and the companies continue to test their cigarettes using the FTC Method.

Q. Did the FTC also investigate the marketing of "ultra light" cigarettes?

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A. Yes. For example, in 1998, the FTC opened an investigation to determine whether the advertising for *Marlboro Ultra Lights* cigarettes was unfair or deceptive. The FTC requested that Philip Morris provide documents related to the marketing of *Marlboro Ultra Lights. See* Correspondence from Lisa B. Kopchik, (Attorney, Division of Advertising Practices, FTC) to Geoffrey C. Bible, (Chairman and Chief Executive Officer, Philip Morris), January 26, 1998 (JD-063624). Documentary evidence does not indicate the current status of the FTC's investigation. To date, the FTC has not taken formal action to change Philip Morris' marketing practices related to *Marlboro Ultra Lights.*

Q. Has Congress been involved in FTC policies involving light descriptors?

A. At times. In 1998, Senator Frank Lautenberg sent a letter to the FTC requesting the Commission

> to begin a proceeding to suspend the right of tobacco companies to market any cigarettes as "Light" or "Ultra Light" or list supposed nicotine and "tar" ratings on their products and advertisements until and unless an accurate system of measuring the health implications of cigarettes is established.

Correspondence from Frank R. Lautenberg (U.S. Senator) to Robert Pitofsky (Chairman, FTC), November 24, 1998 (JD-053641).

Q. How did the FTC respond to this request?

A. The FTC publicly responded to Senator Lautenberg's request in a press release, indicating that it would carefully consider the information he submitted as part of the FTC's ongoing consideration of its testing procedures. The press release stated:

> In September 1997, the Commission proposed revisions to its test method. The proposal was made in response to concerns that the existing system does not accurately reflect actual human smoking behavior, which varies widely among smokers. The National Cancer Institute and the U.S. Food and Drug Administration stated in comments that new data suggests that the limited health benefits, previously believed to be associated with lower tar and nicotine cigarettes, may not exist. The agencies urged the Commission not to make

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> changes in its existing tar and nicotine testing methodology until a complete review of that data could be completed.
>
> The Commission said it will carefully review the documents submitted by Senator Lautenberg, as part of its reevaluation of the system and development of specific recommendations on the future of the FTC's test method. The Commission has formally requested that the Department of Health and Human Services assist it in reviewing the entire system.
>
> While its review is underway, the Commission will conduct a consumer education campaign to alert smokers to the limitations of the current test method. Most importantly, the Commission said, if consumers are concerned about the health effects of smoking they should stop smoking. The consumer education effort to disseminate this message will begin shortly. Simply put, there is no such thing as a safe smoke.

"FTC Statement in Response to Senator Frank Lautenberg's Letter," *FTC Press Release,* November 24, 1998 (JD-004393).

L. <u>1998 – FTC Requests Additional Advice From DHHS</u>

Q. How else has the FTC continued to examine its Test Method?

A. In 1998, the FTC requested further advice from the U.S. Department of Health and Human Services ("DHHS") regarding the test method. *See* Correspondence from Donald S. Clark (Secretary, FTC) to Donna E. Shalala (Secretary, Department of Health and Human Services), November 19, 1998 (JD-003702).

Q. How did the DHHS respond?

A. The DHHS responded in 2001 through the National Cancer Institute by issuing Monograph 13, "Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine." Monograph 13, however, did not provide specific recommendations regarding how the test method should be revised. The National Cancer Institute did state that it would convene a working group to determine what changes should be made to the method:

> The FTC has asked the Department of Health and Human Services (DHHS) for guidance to improve its testing method for tar and nicotine. NCI and other DHHS

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> agencies will convene a working group to review and synthesize the science on this issue and to determine what changes should be made to the testing method to correct limitations identified in the monograph.

"Low-Tar Cigarettes: Evidence Doesn't Indicate a Benefit to Public Health," *NCI Press Release*, November 27, 2001 (JD-041306).

Q. Does the FTC also continue to study the issue of compensation?

A. Yes. For example, in 2000 a study was published in the *Journal of the National Cancer Institute* that concluded that smokers of low and medium yield cigarettes inhale more tar and nicotine than is indicated by the FTC Method. *See* Mirjana V. Djordjevic, Steven D. Stellman, and Edith Zang, "Doses of Nicotine and Lung Carcinogens Delivered to Cigarette Smokers, *Journal of the National Cancer Institute*, vol. 92, no. 2, January 19, 2000 (JD-011143). The FTC's C. Lee Peeler (Bureau of Consumer Protection) and Gerard R. Butters (Bureau of Economics) commented on the study, stating:

> An important, but unheralded, finding of the study by Djordjevic et al. is that, after adjusting the testing method to reflect actual smoking behavior, smokers of low-yield cigarettes had about 25% less exposure to harmful tobacco constituents than smokers of medium-yield cigarettes. Thus, at least in this study, consumers who smoked the cigarettes with the lower machine-measured tar and nicotine yields, in fact, received a reduction in their exposure to harmful cigarette smoke constituents, albeit less of reduction than the FTC numbers would predict.

C. Lee Peeler and Gerard R. Butters, "Re: It's Time for a Change: Cigarette Smokers Deserve Meaningful Information About Their Cigarettes," *Journal of the National Cancer Institute*, vol. 92, no. 10, May 17, 2000 (JD-003896).

Q. Has the FTC made any changes to the FTC Method?

A. The FTC still has not instituted changes to the FTC Method, and the cigarette companies continue to use the FTC Method in their tar and nicotine disclosures in advertisements. *See* Deposition of C. Lee Peeler, *United States of America v. Philip Morris, Inc., et al.,* Volume I, July 30, 2002, pp. 43-44, 367.

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1 M. **The Consequences of the FTC's Tar and Nicotine Policy**

2 **Q. Dr. Langenfeld, is it fair to say that the FTC recognized that publishing tar and**
3 **nicotine ratings would increase consumer awareness of the relative health benefits of**
4 **switching to relatively low tar cigarettes?**

5 A. Yes.

6 **Q. Is it also fair to say that when the FTC mandated that cigarette manufacturers**
7 **publish tar and nicotine ratings, as measured by the FTC Test Method, it recognized that**
8 **the result would be that consumers would, in fact, believe that lower machine-yield delivery**
9 **cigarettes were less hazardous?**

10 A. Yes.

11 **Q. Is it also fair to say that the FTC understood that publishing tar and nicotine ratings**
12 **would provide the cigarette companies with an incentive to compete based on lower**
13 **machine-yield ratings?**

14 A. Yes.

15 **Q. And is it fair to say that requiring manufacturers to publish tar and nicotine ratings**
16 **in advertisements, knowing it would lead consumers to believe that lower delivery**
17 **cigarettes were less hazardous remains the FTC's policy event today?**

18 A. Yes.

19 **VII. FTC SUBSTANTIATION POLICY RELATED TO "HEALTH" CLAIMS,**
20 **OTHER THAN TAR & NICOTINE CLAIMS, IN CIGARETTE ADVERTISING**

21 A. **The Application of the Substantiation Policy**

22 **Q. Dr. Langenfeld, please remind the Court again what the FTC's Policy Statement**
23 **Regarding Advertising Substantiation requires.**

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1 A. The FTC states that it requires that advertisers be able to substantiate claims in
2 advertising. The FTC's Substantiation Policy in particular requires "that advertisers and ad
3 agencies have a reasonable basis for advertising claims before they are disseminated." FTC
4 Policy Statement Regarding Advertising Substantiation (JD-043531).

5 **Q. Dr. Langenfeld, between 1966 and the present, what health claims did the FTC**
6 **allow as substantiated?**

7 A. The only claims possibly related to health the FTC considered substantiated were those
8 related to what we have been discussing, the tar and nicotine content of cigarette smoke as
9 measured by the Cambridge/FTC Method.

10 **Q. Did the FTC allow collateral health claims at this time?**

11 A. As we have seen, starting in 1967, the FTC's policy was to encourage the development
12 and marketing of lower yield cigarettes as measured by the Cambridge/FTC Method. However,
13 the FTC clearly stated that additional "health" claims in cigarette advertising were not acceptable
14 at that time.

15 In the FTC's 1966 press release announcing the change in policy regarding tar and
16 nicotine claims, the Commission stated that representations of correctly measured "tar" and
17 nicotine ratings would be permitted "so long as (1) no collateral representations (other than
18 factual statements of tar and nicotine contents of cigarettes…) are made, expressly or by
19 implication, as to reduction or elimination of health hazards …." *Federal Trade Commission*
20 *News Release*, March 25, 1966 [1000293445] (JD-004612).

21 In a 1967 policy statement issued at the request of the National Association of
22 Broadcasters, the FTC explicitly stated that it would not allow claims that low tar cigarettes were
23 "safer" regardless of their tar and nicotine yields. In addition, the FTC stated that any tar and
24 nicotine claims not based on a government-approved method would be considered misleading:

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> After review and reexamination in the light of the foregoing, the Commission's current enforcement policy in regard to statements of, and representations relating to, tar and nicotine content of cigarettes may be formulated as follows: As a general rule, the Commission will not challenge such statements or representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the Federal Trade Commission, as described in its release issued August 1, 1967. Advertisements which correctly report official FTC tar and nicotine yield data are within this category. On the other hand, statements or representations based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public.
>
> … It must also be borne in mind that, while presently available scientific data indicate that a substantial reduction of tar and nicotine intake may lower the harmful effects, there is not reliable evidence that the health hazards of cigarette smoking are thereby eliminated or avoided. Hence, no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as "safe" or "safer".

Correspondence from Joseph W. Shea (Secretary, FTC) to Howard H. Bell (Director, The Code Authority, National Association of Broadcasters), October 25, 1967 [FTCDOCS-0099-0165] – [FTCDOCS-0099-0168] (JD-003713).

Q. Has the FTC continued to investigate cigarette advertising related to health claims?

A. Yes, the FTC continues to monitor and enforce its position on collateral health claims. For example, the FTC has opened investigations regarding reduced carcinogen claims contained in R.J. Reynolds *Eclipse* and Liggett *Omni* advertising. *See* Deposition of Joseph P. Mulholland, *United States of America v. Philip Morris, Inc., et al.*, September 4, 2002, pp. 116-117. It is unclear whether the Commission will determine whether there is enough evidence to substantiate these claims.

A. <u>The FTC's Requirement of Placing Health Warnings in Cigarette Ads</u>

Q. Dr. Langenfeld, has the placement of health warnings in cigarette advertisements played a role in the FTC's substantiation policy regarding cigarette advertising?

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A. Yes. In 1971, the FTC announced its intention to file complaints against the major cigarette companies alleging that cigarette advertisements without warning statements were unfair and deceptive. *See* Federal Trade Commission Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act for the Year 1980, November 15, 1982, p. 2 (JD-002088). The FTC alleged:

> By advertising cigarettes to the public without making clear and conspicuous disclosures in said cigarette advertisements that cigarette smoking is dangerous to health, respondents represent, directly or by implication, that their cigarettes are not dangerous to health.

In the Matter of Lorillard, et al., 80 F.T.C. 455 (1972). The FTC obtained consent agreements from the companies in which they agreed to place the Surgeon General's warning in advertisements.

Q. What does this show about the FTC's enforcement of its substantiation policy?

A. This is another example of the FTC enforcing its policy requiring cigarette advertising substantiation. Although the cigarette companies were not making explicit "health" claims in their advertising, the FTC considered advertisements that did not explicitly warn consumers regarding the dangers associated with smoking to be unfair and deceptive. The FTC believed that cigarette advertisements not containing a warning would have "the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the smoking of said cigarettes … are not dangerous to health…." *In the Matter of Lorillard, et al.,* 80 F.T.C. 455 (1972).

Q. What other actions has the FTC taken with respect to warnings in cigarette advertisements?

A. The FTC clarified its warnings in cigarette advertisements policy with additional formal actions during the mid-1970s addressing warning size, placement, and language requirements.

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1 *See* Federal Trade Commission Report to Congress Pursuant to the Federal Cigarette Labeling
2 and Advertising Act for the Year 1980, November 15, 1982, pp. 4-5 (JD-002088).

3 **Q. How did the cigarette companies eventually respond to these FTC actions?**

4 A. The cigarette companies complied with the FTC's warning policy.

5 **B. <u>1981 Staff Report and Recommendations to Congress Regarding Health</u>**
6 **<u>Warnings</u>**

7 **Q. Dr. Langenfeld, earlier you discussed the 1981 FTC Staff Report on the Cigarette**
8 **Advertising Investigation. What other issues, besides compensation, did this report**
9 **address?**

10 A. The report also addressed the effectiveness of cigarette health warnings, and the FTC
11 staff recommended that the warning label system be changed.

12 **Q. What changes were recommended in this report?**

13 A. The FTC staff recommended the adoption of a rotating warning label system.

14 **Q. What became of these recommendations?**

15 A. The 1981 FTC staff report was forwarded to Congress. In 1984, Congress generally
16 followed the FTC staff's recommendations regarding warnings and passed legislation requiring a
17 rotating warning label system both on packs and in cigarette advertisements. *See Comprehensive*
18 *Smoking Education Act*, Public Law 98-474, October 12, 1984 (JD-001967).

19 The cigarette companies responded by complying with the new law. The FTC has not
20 had to take any formal action against the defendants regarding compliance with the rotating
21 warning label requirements.

22 **C. <u>"MR FIT"</u>**

23 **Q. Dr. Langenfeld, has the FTC investigated and challenged non-traditional**
24 **advertisements?**

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1 A. Yes. For example, in 1985 R.J. Reynolds ran an "advertorial" in various magazines
2 addressing the results of a government-sponsored study know as the Multiple Risk Factor
3 Intervention Trial, or "MR FIT." R.J. Reynolds stated in this "advertorial," among other things,
4 that the study had not found statistical association linking smoking to heart disease.

5 **Q. How did the FTC respond to this MR FIT advertorial?**

6 A. In June 1986, the FTC issued a complaint against R.J. Reynolds claiming that the
7 advertorial was false or misleading and deceptive. In effect, the FTC did not challenge the
8 truthfulness of R.J. Reynolds' statements, but instead argued that the "advertorial" was deceptive
9 because it omitted facts that the FTC considered material to consumers.

10 **Q. What became of this case?**

11 A. R.J. Reynolds filed a motion to dismiss the complaint on June 26, 1986. On August 4,
12 1986, the Administrative Law Judge issued an order dismissing the complaint, concluding that
13 the advertisement should not be considered commercial speech and therefore did not fall under
14 the jurisdiction of the FTC. The Commission issued an opinion on March 4, 1988 reversing and
15 remanding the judge's order. *See In the Matter of R.J. Reynolds Tobacco Co.,* 111 F.T.C. 539
16 (1988) (JD-043543). R.J. Reynolds responded in May 1989 by entering into an agreement with
17 the FTC. The FTC order required R.J. Reynolds to cease and desist from certain representations
18 about the MR FIT study, failing to disclose certain parts of the study, and making any
19 misrepresentation, either direct or implied, about any study of smoking and health.

20 **Q. Does this case show anything about FTC's policy concerning the cigarette industry's**
21 **communications to consumers?**

22 A. Yes. The FTC's actions and R.J. Reynolds' succumbing to FTC pressure in the MR FIT
23 case indicate that the FTC controls not only traditional advertisements, but also published
24 "opinions" when cigarette manufacturers communicate them directly to consumers. These other

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types of health related communications can be literally true, as was the case in MR FIT, but the FTC would challenge them as deceptive due to omitted facts that the FTC believes are material to consumers.

D. 1989 – FTC's Next/Merit De-Nic Investigation

Q. In addition to R.J. Reynolds, did the FTC also investigate Philip Morris' advertising of a potentially less hazardous cigarette?

A. Yes. In the mid-1980s, Philip Morris began developing a cigarette containing virtually no nicotine, called Next. The Coalition on Smoking OR Health filed a petition with the FTC making the following allegations. The petition stated:

> The package labels and advertisements for Next cigarettes falsely and misleadingly imply that Next cigarettes are a safe, non-addictive alternative to traditional tobacco products.
>
> …. Philip Morris has not substantiated and cannot substantiate any implied claims that Next cigarettes contain so little nicotine as to eliminate the concern about either addiction or the health effects of nicotine. In addition, Next cigarettes may be more dangerous than traditional ultra-low "tar" cigarettes because Next cigarettes contain far higher levels of "tar" than other cigarettes with comparable levels of nicotine and higher levels of carbon monoxide than several other brands of ultra-low tar cigarettes.

Petition of the American Heart Association, the American Lung Association, and the American Cancer Society, Acting as The Coalition on Smoking OR Health," Before the Federal Trade Commission, p. 2 (JD-067562).

The Coalition requested the FTC to take action against Philip Morris:

> [The Coalition] urge[s] the Federal Trade Commission to take prompt action (1) to require Philip Morris to stop making the false and deceptive claims currently begin made for Next cigarettes and (2) to require Philip Morris to take corrective action to undo the false and misleading statements provided by Philip Morris to consumers with regard to these products.

Id. at 14.

Q. Did the FTC open an investigation of other lower yield cigarettes?

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1 A. Yes, the FTC opened an investigation examining the advertising of Next.

2 **Q. Did the FTC request information from Philip Morris regarding Next?**

3 A. Yes. The FTC requested that Philip Morris provide information regarding its advertising
4 and marketing of Next De-Nic. The FTC was apparently concerned, among other things, about
5 what consumers were taking away from the Next De-Nic advertising beyond the explicit claims
6 of "De-Nicotined Tobacco."

7 **Q. Did the FTC close its investigation of Next?**

8 A. Next De-Nic was a market failure, and the FTC closed its investigation of Next De-Nic
9 advertising because Philip Morris withdrew the product from the market.

10 **Q. What does the Next investigation show about FTC's effect on cigarette advertising?**

11 A. The Next investigation is another example of the FTC enforcing its policy regarding
12 implied health claims in cigarette advertising. Philip Morris' development and marketing of
13 Next De-Nic shows a cigarette company attempting to compete within the bounds defined by the
14 FTC, but ultimately failing.

15 **E. <u>FTC's Premier/Eclipse Investigations</u>**

16 **Q. Dr. Langenfeld, did the FTC investigate advertisements of other so-called**
17 **"nontraditional" cigarettes?**

18 A. Yes, it did.

19 **Q. Can you give us an example of this?**

20 A. In October 1988, R.J. Reynolds introduced into test market a cigarette that heated rather
21 than burned tobacco called Premier. Subsequently, the FTC initiated an investigation of its
22 marketing. *See* Deposition of C. Lee Peeler, *United States of America v. Philip Morris, Inc., et*
23 *al.,* Volume III, August 1, 2002, p. 830; Correspondence from John D. Graubert (Deputy

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1 General Counsel, FTC) to Lucia M. Valente (Counsel to the Attorney General, New York Office
2 of the Attorney General), September 10, 1998 (JD-004572).

3 **Q. When did the FTC close its investigation of Premier?**

4 A. *Premier* failed in test markets and was withdrawn. It was not well-received by
5 consumers and faced opposition from the public health community. The FTC then closed its
6 investigation of *Premier* on July 6, 1989. *See* Correspondence from John D. Graubert (Deputy
7 General Counsel, FTC) to Lucia M. Valente (Counsel to the Attorney General, New York Office
8 of the Attorney General), September 10, 1998 (JD-004572); Deposition of C. Lee Peeler, *United*
9 *States of America v. Philip Morris, Inc., et al.,* Volume III, August 1, 2002, p. 974.

10 **Q. Did the FTC investigate other "non-traditional" R.J. Reynolds' products?**

11 A. Yes. In 1996, R.J. Reynolds began test marketing another cigarette, Eclipse, which was
12 based on the heating rather than burning tobacco technology. As with Premier, the FTC
13 investigated R.J. Reynolds' claims regarding Eclipse. *See* Deposition of Joseph Mulholland,
14 *United States of America v. Philip Morris, Inc., et al.,* September 4, 2002 p. 116-117.

15 **Q. Is Eclipse still being marketed?**

16 A. Yes. In recent years, R.J. Reynolds began wider advertising and distribution of the
17 product. R.J. Reynolds now specifically claims that Eclipse is a "new cigarette that may present
18 less risk."

19 **Q. What is the status of the FTC's investigation of Eclipse?**

20 A. As of August 1, 2002, an FTC investigation of Eclipse was still open. *See* Deposition of
21 C. Lee Peeler, *United States of America v. Philip Morris, Inc., et al.,* Volume III, August 1, 2002,
22 p. 835.

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1 F. **"Additive Free" Cigarette Investigations**

2 **Q. Dr. Langenfeld, have the cigarette companies also marketed "additive free"**
3 **cigarettes?**

4 A. Yes. During the late 1990s, three cigarette companies advertised products as having no
5 additives and/or as "All Natural." The three companies were (1) R.J. Reynolds, which used an
6 advertising campaign for Winston that stated: "No Bull." "100% Tobacco." "No Additives"; (2)
7 Santa Fe Natural Tobacco Company, which made the following claims in advertisements for its
8 products: "Made from 100% Chemical-Additive-Free, Whole Leaf, Natural Tobacco and nothing
9 else"; and (3) Alternative Cigarettes, which touted its Glory and Pure cigarettes as "100%
10 Natural Tobacco Cigarettes … Additive Free." In addition, Alternative Cigarettes also marketed
11 two herbal cigarette brands, Herbal Gold and Magic, as "Nicotine Free Herbal Cigarettes."

12 **Q. Did the FTC take action against these advertised products?**

13 A. Yes. Although these claims were apparently true, the FTC believed that consumers
14 might take away a message that the products were potentially less hazardous than cigarettes that
15 contained additives. The FTC filed complaints against the companies.

16 **Q. How was the complaint against Reynolds resolved?**

17 A. Reynolds entered into a consent order with the FTC.

18 **Q. Has R.J. Reynolds complied with the consent order?**

19 A. I have seen no evidence that the FTC thinks that R.J. Reynolds has not complied with the
20 consent order.

21 **Q. How did the FTC respond to advertising of the Santa Fe Natural Tobacco**
22 **Company?**

23 A. In 2000, the FTC issued a complaint against Santa Fe Natural Tobacco Company for

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> [representing] expressly or by implication, that smoking Natural American Spirit tobacco cigarettes, because they contain no additives or chemicals, is less hazardous to a smoker's health than smoking otherwise comparable cigarettes that contain additives or chemicals.

In the Matter of Santa Fe Natural Tobacco Company, Inc., United States of America Before Federal Trade Commission, Docket No. C-3952, Complaint <http://www.ftc.gov/os/2000/06/santafecmp.htm> (JD-043631).

It was the belief of the Commission that ads for Natural American Cigarettes stating, "Made from 100% Chemical-Additive-Free, Whole Leaf, Natural Tobacco and nothing else," mislead consumers to believe the cigarette was not harmful to health as other cigarettes containing additives. *Id.*

Q. What did the consent order in this case dictate?

A. The FTC order in the case required that ads for Natural American Spirit Tobacco display the warning, "No additives in our tobacco does NOT mean a safer cigarette." *In the Matter of Santa Fe Natural Tobacco Company, Inc., United States of America Before Federal Trade Commission,* Docket No. C-3952, Decision and Order <http://www.ftc.gov/os/2000/06/santafe.do.htm> (JD-054779).

Q. Has the Santa Fe Natural Tobacco Company complied with this consent order?

A. I have seen no evidence that the FTC thinks that Santa Fe Natural Tobacco Company has not complied with the consent order.

Q. How did the FTC respond to advertising of Alternative Cigarettes?

A. The FTC filed a similar complaint against Alternative Cigarettes regarding its advertising for Pure and Glory cigarettes, and the order in the case required the same disclosures that were contained in the R.J. Reynolds and Santa Fe consent orders. *See In the Matter of Alternative Cigarettes, Inc. and Joseph Pandolfino, United States of America Before Federal Trade*

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Commission, Docket No. C-3956, Decision and Order, <http://www.ftc.gov/os/2000/06/altcig.do.htm> (JD-043630).

In addition, the FTC stated in its complaint against Alternative Cigarettes that while Herbal Gold and Magic cigarettes were nicotine free, "their smoke, like the smoke from tobacco cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide." *In the Matter of Alternative Cigarettes, Inc. and Joseph Pandolfino, United States of America Federal Trade Commission,* Docket No. C-3956, Complaint, <http://www.ftc.gov/os/2000/04/alternativecomplaint.htm> (JD-043624).

Q. What did the consent order in this case dictate?

A. The FTC ordered that Alternative Cigarettes include in advertisements and packaging for herbal cigarettes the following warning:

> Herbal cigarettes are dangerous to your health.
>
> They produce tar and carbon monoxide

In the Matter of Alternative Cigarettes, Inc. and Joseph Pandolfino, United States of America Before Federal Trade Commission, Docket No. C-3956, Decision and Order, <http://www.ftc.gov/os/2000/06/altcig.do.htm> (JD-043630).

Q. Has Alternative Cigarettes complied with this consent order?

A. I have seen no evidence that the FTC thinks that Alternative Cigarettes has not complied with the consent order.

Q. What do these cases show about the FTC's treatment of implied health claims?

A. These three cases are additional examples of the FTC focusing on implied health claims and "consumer takeaway" when addressing deception and substantiation issues.

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VIII. FTC ACTIONS REGARDING CIGARETTE ADVERTISING AND YOUTH

A. General FTC Policy Regarding Advertising and Youth

Q. Dr. Langenfeld, does the FTC monitor and investigate advertising that is either targeted to youth or potentially reaches youth?

A. Yes. The FTC is especially sensitive to marketing practices that potentially affect youth purchasing and consumption decisions. The FTC recognizes that children tend to be less sophisticated than adults and consequently are more susceptible to potentially deceptive and/or unfair marketing practices. When examining a potentially deceptive marketing practice, the Commission tries to determine if the practice

> is one that would likely deceive a consumer acting reasonably under the circumstances in a material way – that is, in a way that affects the consumer's conduct or choice regarding a product or service. In assessing advertising or other marketing practices that affect or are directed primarily to a particular audience, the Commission considers the effect of the ad or practice on that audience. Thus, [the FTC's] examination of children's advertising takes into account the limited ability of children to detect exaggerated or untrue statements. An interpretation that might not be reasonable for an adult may well be reasonable from the perspective of a child. Claims tend to be taken literally by young children.

"The ABCs at the FTC: Marketing and Advertising to Children," Summary of Prepared Remarks of Commissioner Roscoe B. Starek, III, (FTC), Advertising and Promotion Law 1997, Minnesota Institute of Legal Foundation, July 25, 1997 (footnotes omitted) (JD-043606).

When examining potentially unfair marketing practices ("those that cause or are likely to cause substantial injury to consumers when that injury is not reasonably avoidable by the consumers themselves and is not outweighed by countervailing benefits to consumers or competition") the FTC tries to determine "how susceptible the affected audience may be to the act or practice in question. Children tend to imitate other children and they often lack the ability to foresee and avoid dangers. Thus, ads that show young children engaging in potentially hazardous activities, such as cooking hot foods or using a blowdryer next to a bathroom sink

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filled with water, are unfair even though adults might reasonably avoid injury when engaging in similar activities." *Id.* (footnote omitted).

Q. Does the FTC treat advertising that is targeted to adults, but that may also reach youth, differently than it treats advertising specifically targeted to youth?

A. Yes. Analysis of the effects of advertising on youth and the determination of appropriate remedies is more complicated when an advertisement is targeted to an adult audience but is also viewed by youth. For example, when considering the advertising for products that are legal only for adult purchase and/or consumption, e.g., cigarettes and alcohol, the FTC generally takes into account the competitive benefits of the advertising, the rights of advertisers to promote legal products, and the rights of adults to obtain information regarding legal products. The FTC weighs these benefits and rights against the harm, if any, that the advertising may have on youth. *See* "The ABCs at the FTC: Marketing and Advertising to Children," Summary of Prepared Remarks of Commissioner Roscoe B. Starek, III, (FTC), Advertising and Promotion Law 1997, Minnesota Institute of Legal Foundation, July 25, 1997 (JD-043606).

Q. Does the FTC consider First Amendment rights when considering whether it should attempt to restrict advertising of adult products?

A. According to FTC officials, it does. In these situations, the FTC considers First Amendment rights when deciding whether to take formal action against a specific advertising practice. *See* "The ABCs at the FTC: Marketing and Advertising to Children," Summary of Prepared Remarks of Commissioner Roscoe B. Starek, III, (FTC), Advertising and Promotion Law 1997, Minnesota Institute of Legal Foundation, July 25, 1997 (JD-043606).

Q. What other tools, besides formal action, does the FTC have to restrict advertising of adult products that may also reach underage individuals?

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A. As I discussed earlier, the FTC also encourages voluntary advertising restrictions in order to achieve its policy goals, including protecting youth from exposure to advertising for adult products. *See* "The ABCs at the FTC: Marketing and Advertising to Children," Summary of Prepared Remarks of Commissioner Roscoe B. Starek, III, (FTC), Advertising and Promotion Law 1997, Minnesota Institute of Legal Foundation, July 25, 1997 (JD-043606). Voluntary restrictions often allow the FTC to accomplish more in a more timely manner than it could achieve through formal action against a company or a group of companies in a specific industry: "Well-constructed industry self-regulatory efforts offer several advantages over government regulation or legislation. Self-regulation often can be more prompt, flexible, and effective than government regulation. It can permit application of the accumulated judgment and experience of an industry to issues that are sometimes difficult for the government to define with bright line rules. With respect to advertising practices, self-regulation is an appropriate mechanism because many forms of government intervention raise First Amendment concerns." "Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers," Federal Trade Commission, September 1999 (footnote omitted) (JD-063954).

B. <u>FTC Activities Regarding Cigarette Advertising and Youth Issues</u>

Q. Dr. Langenfeld, has the FTC specifically monitored and investigated cigarette advertising that could potentially appeal to underage smokers?

A. Yes. The FTC has long been concerned about the potential impact of cigarette advertising on youth, as expressed in its Statement of Basis and Purpose for its 1964 rulemaking (discussed above). The FTC has taken actions it deemed appropriate to protect youth, again reflected in its 1964 rulemaking. Since the FTC and Congress required warnings on cigarette packs and in ads in 1965, the Commission has investigated the marketing practices of the major cigarette manufacturers, and challenged an instance where it had reason to believe that a

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1 particular cigarette advertising campaign constituted an "unfair act or practice" with respect to
2 underage consumers. *See* Complaint in the Matter of R.J. Reynolds Tobacco Company, United
3 States Federal Trade Commission, Docket No. 9285, May 28, 1997 (JD-043605). Accordingly,
4 the FTC has monitored, investigated, and taken action against cigarette advertising that would
5 potentially appeal to underage smokers.

6 **Q. Could you give us an example of a specific FTC investigation that concerned alleged**
7 **youth advertising since the 1960s?**

8 A. In 1990, New York City Consumer Affairs Commissioner, Mark Green, petitioned the
9 FTC urging the Commission to reduce the risk that children will smoke. The FTC subsequently
10 opened a general investigation of cigarette marketing practices in an effort to determine whether
11 the companies

12 engaged in unfair or deceptive acts or practices … in their advertising and
13 marketing of cigarettes to an audience whose members include a substantial
14 number of persons who cannot legally purchase cigarettes. The investigation is
15 also to determine whether Commission action to obtain redress of injury to
16 consumers or others would be in the public interest.

17 Resolution Directing Use of Compulsory Process in Nonpublic Investigation of the Cigarette
18 Industry, May 25, 1990 [FTCDOCS-0265-1571] – [FTCDOCS-0265-1573] (JD-004580).

19 **Q. Did the FTC require information from the cigarette companies regarding their**
20 **advertising practices?**

21 A. The FTC used compulsory process to compel the major cigarette manufacturers to
22 provide documents related to their advertising and marketing practices that might affect youth
23 smoking. *See* Civil Investigative Demand to Philip Morris from United States of America,
24 Federal Trade Commission, August 1, 1990 [FTCDOCS-0261-0422] – [FTCDOCS-0261-0436]
25 (JD-043553).

26 **Q. What did the FTC conclude from the investigation?**

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A. Following the investigation, the FTC did not decide to adopt Commissioner Green's recommendations. The FTC did, however, consider filing a complaint against R.J. Reynolds regarding its "Joe Camel" advertising campaign.

Q. Did this lead to an FTC complaint against R.J. Reynolds concerning Joe Camel advertising?

A. The FTC investigated R.J. Reynolds' Camel advertising as part of this investigation. In 1993-1994, the FTC considered issuing a complaint against R.J. Reynolds relating to its Joe Camel advertising campaign. However, after an extensive investigation, the Commission voted to close the investigation. The majority wrote the following:

> Although it may seem intuitive to some that the Joe Camel advertising campaign would lead more children to smoke or lead children to smoke more, the evidence to support that intuition is not there. Our responsibility as commissioners is not to make decisions based on intuition but to evaluate the evidence and determine whether there is reason to believe that a proposed respondent violated the law. The Commission has spent a great deal of time and effort reviewing the difficult factual and legal questions raised by this case, including a comprehensive review of relevant studies and statistics. Because the evidence in the record does not provide reason to believe that the law has been violated, we cannot issue a complaint.
>
> If intuition and concern for children's health were a sufficient basis under the law for bringing a case, we have no doubt that a unanimous Commission would have taken that action long ago. The dispositive issue here, however, was whether the record showed a link between the Joe Camel advertising campaign and increased smoking among children, not whether smoking has an effect on children or whether the health of children is important. Indeed, our concern about the health of children led us to consider every possible avenue to a lawsuit before reaching today's decision.

Joint Statement of Commissioners Mary L. Azcuenaga, Deborah K. Owen, and Roscoe B. Starek, III, in *R.J. Reynolds Tobacco Co.,* File No. 932-3162, June 7, 1994 (JD-060951).

Q. Did the FTC reopen its investigation of Joe Camel advertising?

A. Yes. In 1996, the FTC received requests from members of Congress to reopen the Joe Camel investigation. The FTC responded by reopening the investigation and issuing a complaint

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in 1997. *See* Complaint *In the Matter of R.J. Reynolds Tobacco Company, United States Federal Trade Commission,* Docket No. 9285, May 28, 1997 (JD-043605).

Q. What conclusions did the FTC come to regarding Joe Camel?

A. In 1999, the FTC withdrew its complaint before the case was resolved. The Commission stated that the relief it was seeking was accomplished via the Master Settlement Agreement between the cigarette manufacturers and the states' attorneys general in 1998. *See* "Federal Trade Commission Dismisses Joe Camel Complaint," *FTC Press Release*, January 27, 1999 (JD-043621).

Q. Has the FTC received other complaints regarding advertising allegedly appealing to youth?

A. In February 1992, the Coalition on Smoking OR Health petitioned the FTC, alleging:

> False images that link smoking with tall, thin, elegant, attractive women and advertising slogans which associate tobacco use with good health through thinness and weight reduction bombard young women on a daily basis.

Before the Federal Trade Commission, Petition of The American Heart Association, The American Lung Association, and The American Cancer Society, United as The Coalition on Smoking OR Health, February 27, 1992, [FTCDOCS-0041-0180] – [FTCDOCS-0401-0191] (JD-043561).

Q. What action did the FTC take?

A. The FTC decided not to take action against the cigarette companies in response to the Coalition's allegations.

Q. Did the FTC receive other complaints from the Coalition on Smoking OR Health regarding youth marketing?

A. In December 1992, the Coalition again petitioned the FTC, this time asking the FTC

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> to issue an administrative complaint against Philip Morris, USA pursuant to Section 5 of the Federal Trade Commission Act for the purpose of ordering Philip Morris to cease and desist the advertising of Marlboro cigarettes through the use of the "Marlboro Adventure Team" advertising campaign.
>
> Despite the tobacco industry's own recognition that cigarette advertising should not show "any smoker participating in, or obviously just having participated in, a physical activity requiring stamina or athletic conditioning beyond that of normal recreation" because of the false and/or deceptive image such advertising portrays and/or because such advertising has a direct appeal to youths, the entire thrust of the "Marlboro Adventure Team" campaign is to portray smoking as an integral part of the extraordinary rigorous activities in which members of the "Marlboro Adventure Team" will participate.

Before the Federal Trade Commission, Petition of The American Heart Association, The American Lung Association, and The American Cancer Society, United as The Coalition on Smoking OR Health, December 10, 1992 [FTCDOCS-0233-0336] – [FTCDOCS-0233-0341] (JD-043566).

Q. What did the FTC conclude?

A. The FTC investigated COSH's allegations, but ultimately decided not to initiate an enforcement action.

Q. Did the FTC receive any other complaints from the Coalition on Smoking OR Health?

A. Yes. In 1994, the Coalition petitioned the FTC to issue a complaint against Philip Morris, R.J. Reynolds and other tobacco companies concerning the advertising of cigarettes that the Coalition asserted unfairly and deceptively advertised to adolescent girls.

Q. What did the FTC conclude?

A. The FTC decided not to take action against the cigarette companies in response to the Coalition's allegations.

Q. Did the FTC conduct any other youth-related investigations?

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1 A. Yes. In May 1995, the FTC received a request to investigate Lorillard's marketing
2 practices related to Harley-Davidson cigarettes. *See* Correspondence from John Slade (UMDNJ,
3 Associate Professor) to Robert Pitofsky (FTC Chairman), May 10, 1995 [FTCDOCS-0264-0150]
4 – [FTCDOCS-0264-0153] (JD-043594). The FTC initiated an investigation of the Harley-
5 Davidson cigarette marketing campaign and the potential effects of the campaign on children in
6 June 1995. *See* Correspondence from Shira D. Modell (FTC, Division of Advertising Practices,
7 Attorney) to Richard Teerlink (Harley-Davidson, President and CEO), June 2, 1995,
8 [FTCDOCS-0280-1240] – [FTCDOCS-0280-1244] (JD-043595).

9 **Q. What became of this investigation?**

10 A. Lorillard and Harley-Davidson, Inc. were involved in litigation related to Lorillard's use
11 of the motorcycle manufacturer's trademark at the time the FTC opened the investigation. In
12 October 1995, the two companies settled their dispute. As part of the settlement, Lorillard
13 agreed to discontinue the use of the Harley-Davidson trademarks by September 2001. However,
14 Lorillard discontinued marketing the brand in 1997 after the initiation of the FTC inquiry, and
15 the FTC closed the investigation. *See* Deposition of C. Lee Peeler, *United States of America v.*
16 *Philip Morris, Inc., et al.,* Volume III, August 1, 2002, p. 1002-03.

17 **Q. Did the FTC investigate Brown & Williamson for any youth-related issues?**

18 A. Yes. In 1997, the FTC opened an investigation of a Brown & Williamson website known
19 as "Circuit Breaker" to determine, among other things, whether it targeted minors.

20 **Q. What conclusions did the FTC reach?**

21 A. After investigating the Internet site, the FTC staff recommended closing the
22 investigation. The FTC thereafter closed the investigation. *See* Correspondence from C. Lee
23 Peeler (FTC, Division of Advertising Practices, Associate Director) to Andrew S. Krulwich

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1 (B&W, Outside Counsel), September 15, 1997 [FTCDOCS-0167-0011] – [FTCDOCS-0167-
2 0016] (JD-043609).

3 **C. FTC Reports to Congress and Cigarette Advertising Expenditures**

4 **Q. Dr. Langenfeld, you discussed earlier that Congress requires the FTC to monitor**
5 **the advertising and promotion activities of the cigarette companies. Does the FTC track**
6 **the dollars spent on cigarette advertising and promotion as part of its oversight of the**
7 **cigarette industry?**

8 A. Yes.

9 **Q. Does the FTC publish these results?**

10 A. Yes. The FTC publishes an annual report to Congress that describes aggregate annual
11 cigarette advertising and promotion expenditures broken down by specific advertising and
12 promotional expense category.

13 **Q. What categories of advertising and promotion are contained in these annual reports**
14 **to Congress?**

15 A. The categories of advertising and promotion expenditures that the FTC requires the
16 cigarette companies to disclose changes over time as market conditions change. For example,
17 Internet advertising expenditures are now required to be reported separately, whereas this
18 expenditure category was not relevant a couple of decades ago. In the most recent report to
19 Congress published in 2004 and covering the year 2002, the FTC reported the following
20 advertising and promotion categories (Federal Trade Commission Cigarette Report For 2002,
21 Issued 2004, Table 2C (JD-013056)):

22 Newspaper Advertising

23 Magazine Advertising

24 Outdoor Advertising

http://legacy.library.ucsf.edu/tid/nyq07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kyhl0001

1 Transit Advertising

2 Point-of-Sale Advertising

3 Price Discounts

4 Promotional Allowances – Retailers

5 Promotional Allowances – Wholesalers

6 Promotional Allowances – Other

7 Sampling Distribution

8 Specialty Item Distribution – Branded

9 Specialty Item Distribution – Non-Branded

10 Public Entertainment – Adult-Only

11 Public Entertainment – General-Audience

12 Sponsorships

13 Endorsements & Testimonials

14 Direct Mail

15 Coupons

16 Retail Value Added – Bonus Cigarettes

17 Retail Value Added – Non-Cigarette Bonus

18 Company Web Site

19 Internet – Other

20 Telephone

21 Other

22 **Q. Dr. Langenfeld, will you describe in more detail what is meant by "Price Discounts"**

23 **and "Promotional Allowances?"**

http://legacy.library.ucsf.edu/tid/nyq07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kyhl0001

A. As discussed in the Cigarette Report for 2002, price discounts are reductions in price to retailers and wholesalers, such as "off-invoice discounts, buy downs, and voluntary price reductions," which are designed to moderate the overall trend of increasing retail prices (to consumers) of cigarettes. Promotional allowances are also made to retailers and wholesalers. Promotional allowances to retailers are payments "to cigarette retailers in order to facilitate the sale or placement of cigarettes (*e.g.*, payments for stocking, shelving, displaying and merchandising brands, volume rebates, and incentive payments)…." Promotional allowances to wholesalers include "payments for volume rebates, incentive payments, value added services, and promotional execution." Federal Trade Commission Cigarette Report For 2002, Issued 2004, p. 4 (JD-013056).

Q. What is the FTC's definition of "Retail Value Added" in the context of cigarette marketing?

A. The FTC describes retail value added as "costs associated with offers such as 'buy one, get one free' and 'buy three, get a free T-shirt,' where the bonus item is distributed at retail when the cigarettes are purchased." Federal Trade Commission Cigarette Report For 2002, Issued 2004, p. 7 (JD-013056).

Q. Are most "Retail Value Added" expenditures by cigarette companies associated with providing "bonus" cigarettes or providing free non-cigarette items?

A. Virtually all "Retail Value Added" expenditures are associated with bonus cigarette offers, for example, "buy one, get one free." Federal Trade Commission Cigarette Report For 2002, Issued 2004, Table 2C (JD-013056).

Q. What is the FTC's definition of "Specialty Item Distribution" in the context of cigarette marketing?

http://legacy.library.ucsf.edu/tid/nyq07a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/kyhl0001

1 A. "Specialty Item Distribution" is the practice of giving consumers non-cigarette items "by
2 any means other than at point-of-sale with the purchase of cigarettes." These items may bear a
3 cigarette logo and are hence referred to as "branded Specialty Items." Alternatively, these items
4 may not bear a cigarette logo and are referred to as "non-Branded Specialty Items." Federal
5 Trade Commission Cigarette Report For 2002, Issued 2004, p. 5 (JD-013056).

6 **Q. What is the FTC's definition of "Public Entertainment" in the context of cigarette**
7 **marketing?**

8 A. "Public Entertainment" is divided into two sub-categories – "Adult-Only" and "General-
9 Audience." "Adult-Only Public Entertainment" includes events such as concerts that take place
10 in adult-only venues, *e.g.,* bars, at which a cigarette brand and/or logo is displayed. "General-
11 Audience Public Entertainment" involves events that are open to the general public at which a
12 cigarette brand and/or logo is displayed. Federal Trade Commission Cigarette Report For 2002,
13 Issued 2004, p. 6 (JD-013056).

14 **Q. Dr. Langenfeld, what has happened to the level of cigarette advertising expenditures**
15 **over time, according to the FTC data?**

16 A. Demonstrative exhibit JDEM-040263 displays the trend in expenditures on print
17 (magazines and newspapers), outdoor, transit, broadcast (broadcast advertising expenditures
18 were zero for this period due to the cigarette broadcast advertising ban), and point-of-sale
19 advertising, going back to 1980. Expenditures in these categories varied over time, but
20 dropped dramatically following the implementation of the MSA in 1998. Demonstratives
21 exhibits JDEM-040264 through JDEM-040267 display the advertising expenditures since 1980
22 for each of these categories (excluding broadcast advertising, which again was zero during this
23 period).

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Source: http://www.industrydocuments.ucsf.edu/docs/kyhl0001

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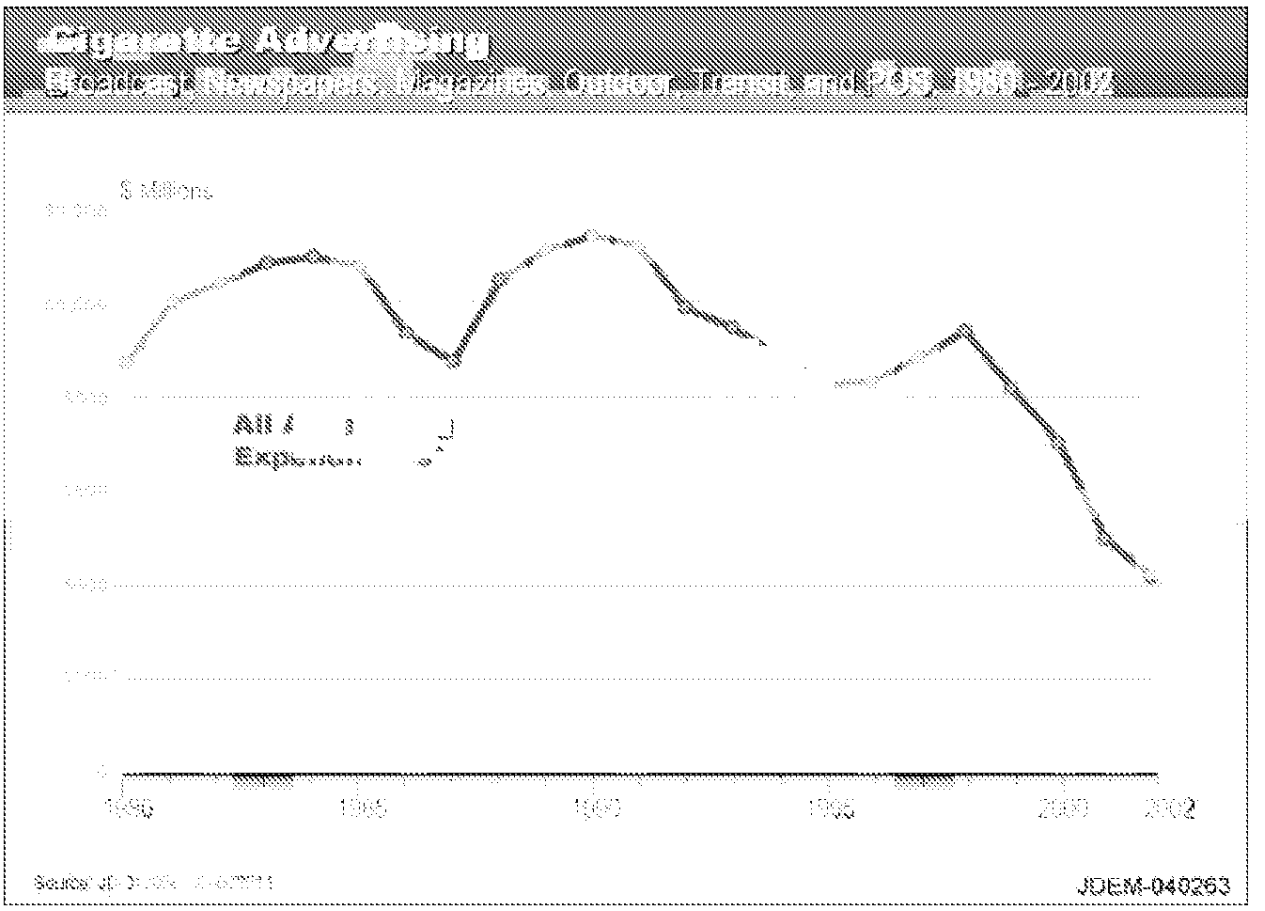

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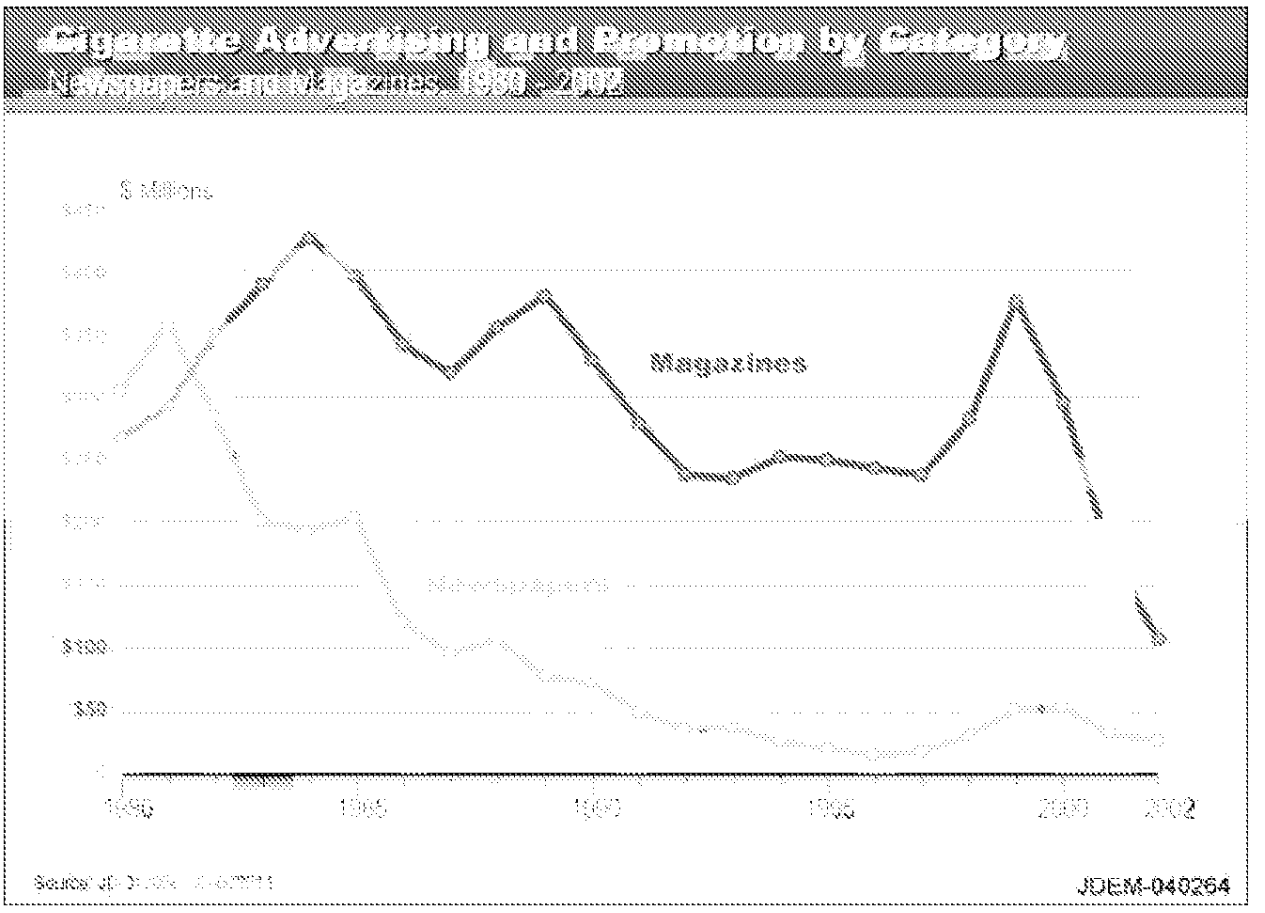

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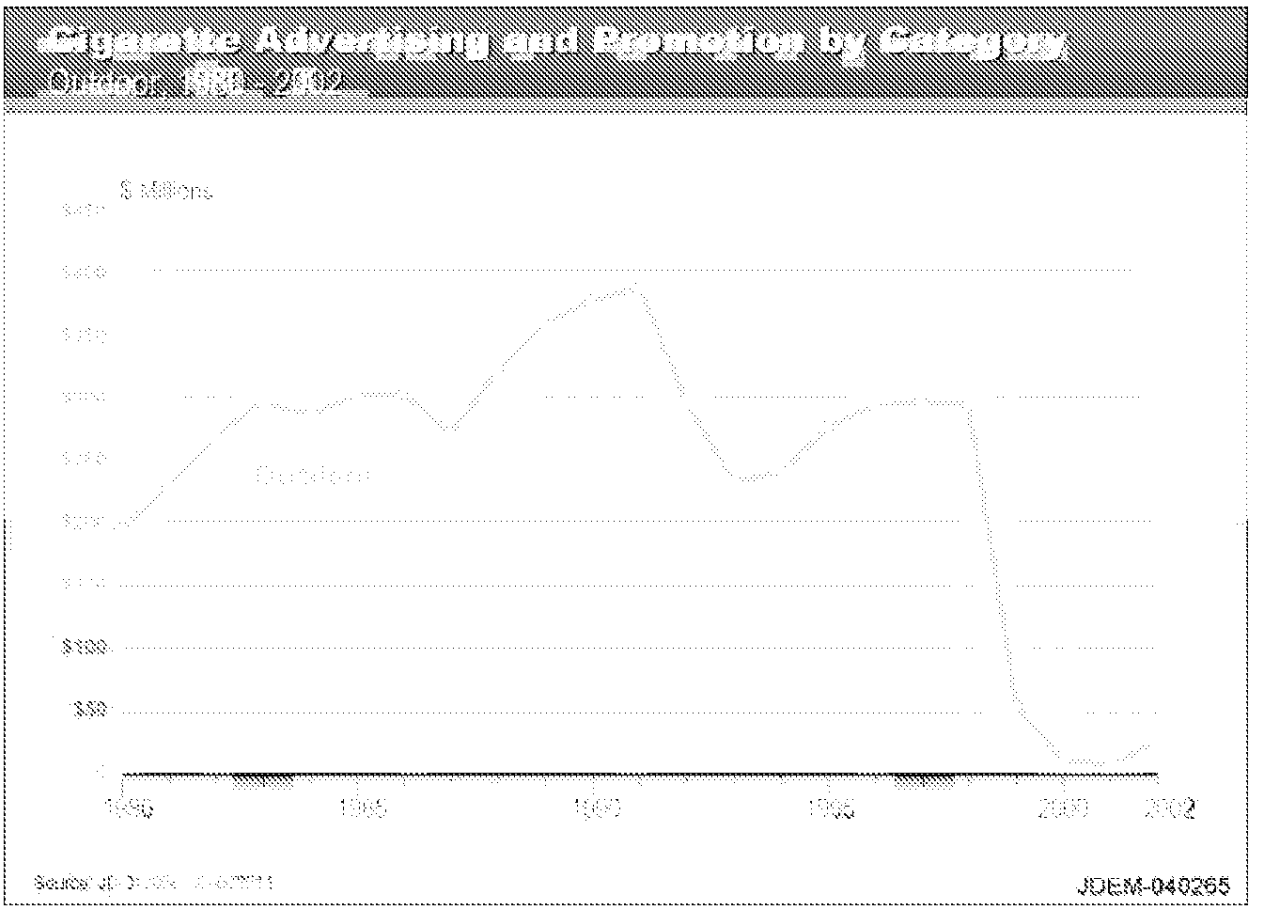

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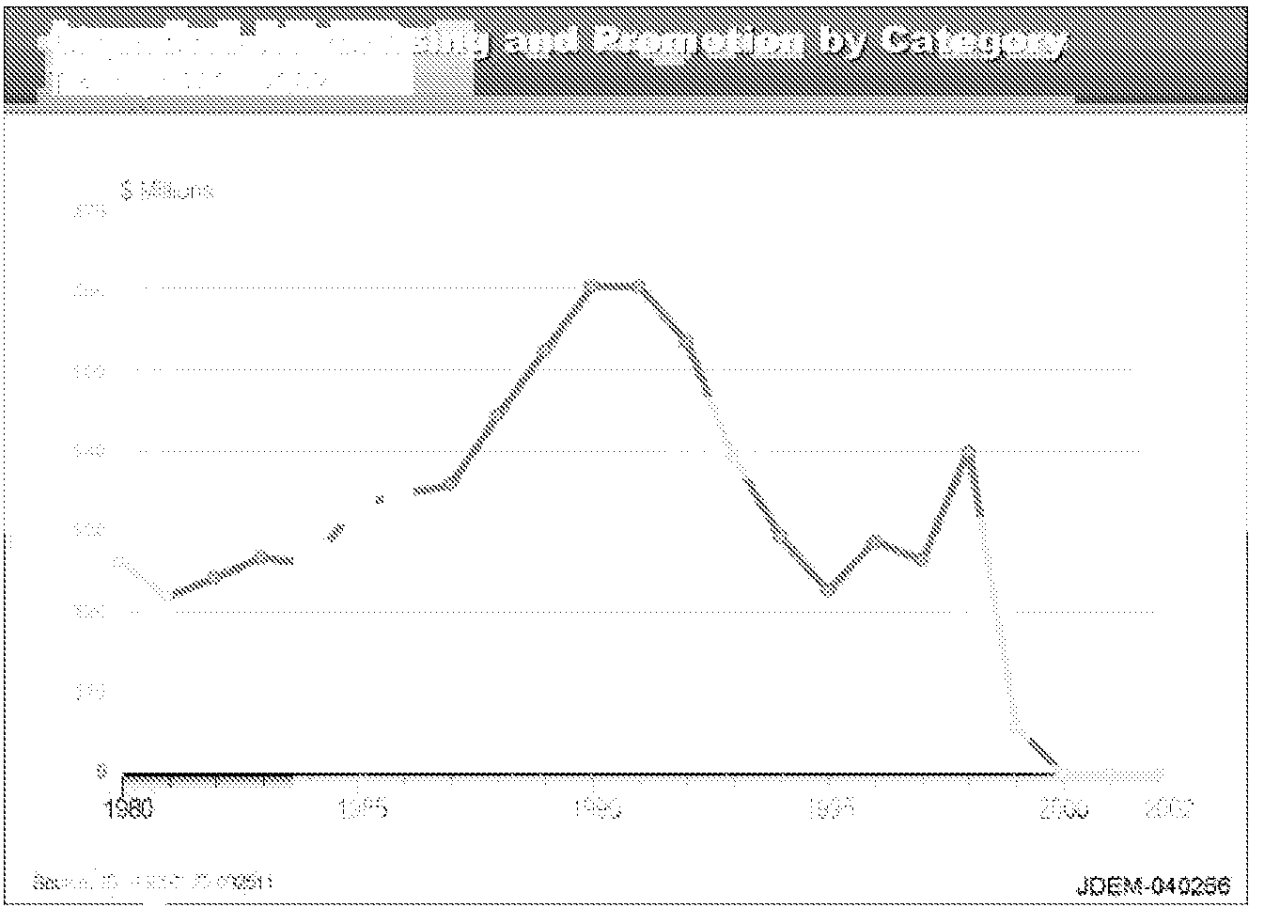

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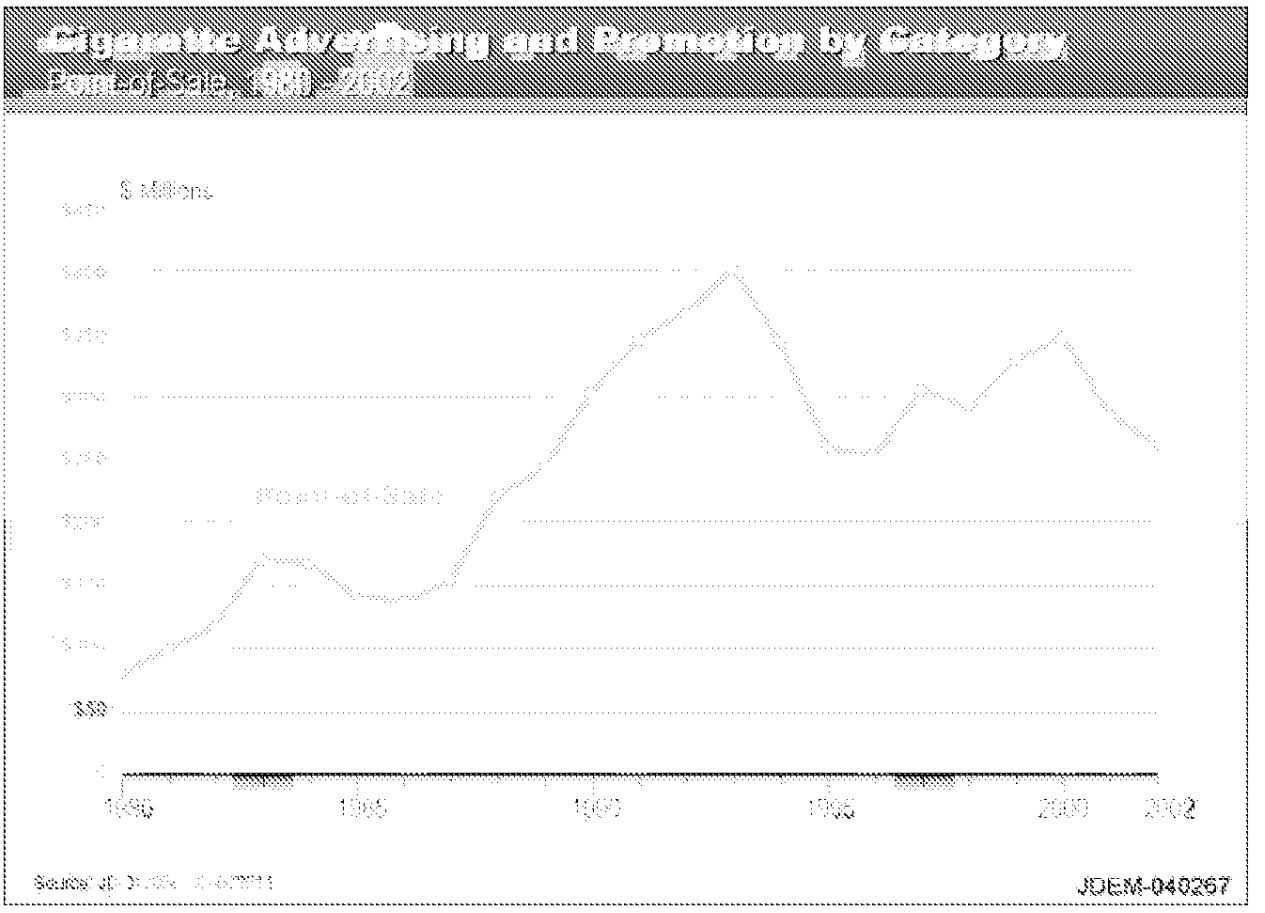

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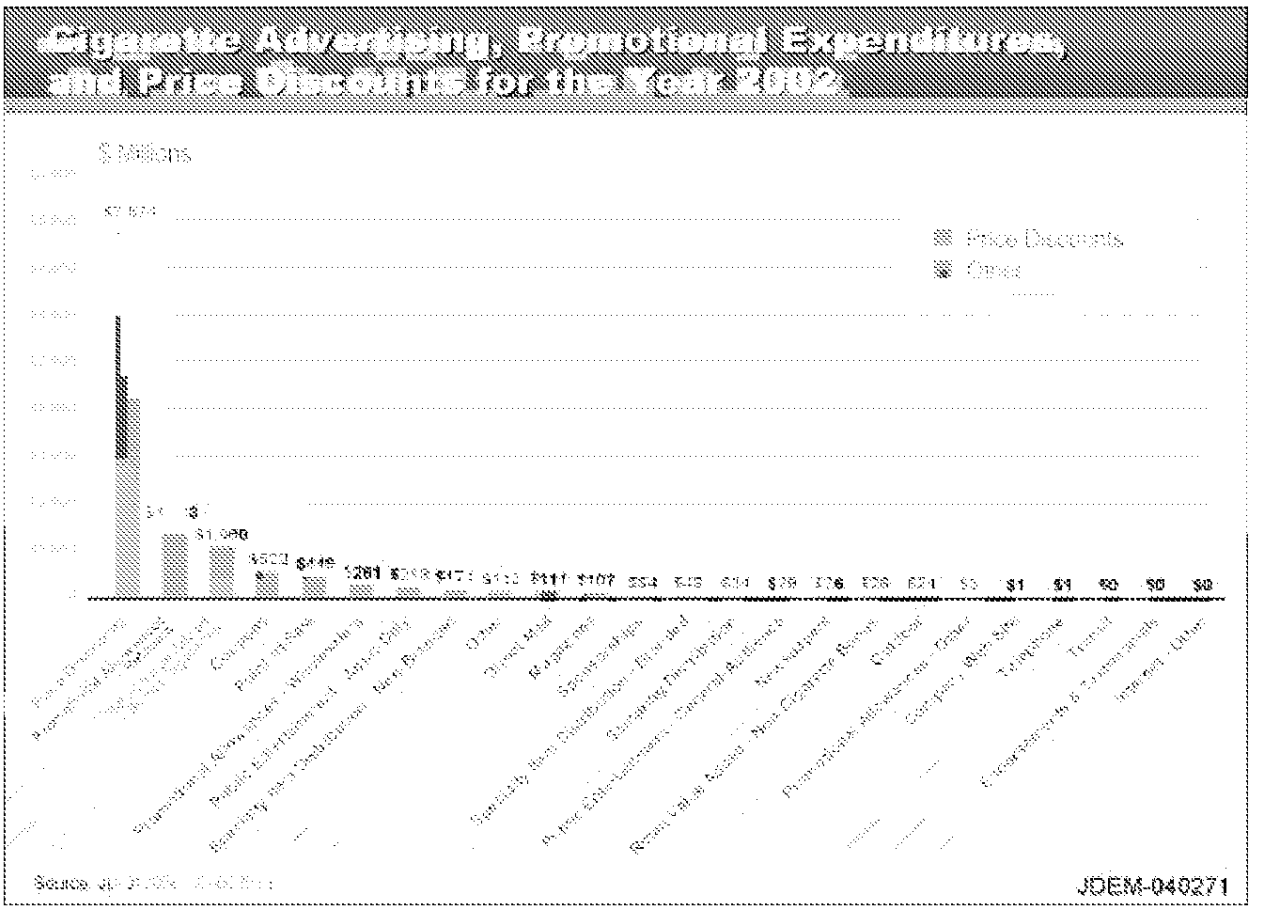

Q. In testimony before this court, Dr. Dean Krugman contended that restrictions contained in the Master Settlement Agreement (MSA) with the states did not result in a shift in cigarette advertising expenditures. Written Direct Testimony of Dr. Dean M. Krugman, at 30. Do you agree with Dr. Krugman's opinion?

A. No. The restrictions in the MSA had a clear impact on the cigarette companies advertising expenditure levels. As JDEM-040271 illustrates, cigarette advertising expenditures fell dramatically following the adoption of the MSA in 1998.

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IX. CURRENT STATE OF AFFAIRS REGARDING THE FTC TAR AND NICOTINE POLICY

Q. Dr. Langenfeld, what is your understanding of the current state of affairs regarding the FTC's tar and nicotine policy?

A. The FTC is apparently still waiting for recommendations from the Department of Health and Human Services regarding whether the FTC Method should be modified, and if so, how.

Q. Are the cigarette companies continuing to look to the FTC for guidance regarding tar and nicotine issues?

A. Yes. Looking to the FTC for guidance on the most accurate way to test for tar and nicotine levels and for advertising low-yield cigarettes in September 2002, Philip Morris submitted a petition proposing the FTC engage in a three-part rulemaking procedure.

Q. What did this Petition request?

A. First, Philip Morris asked the FTC to determine whether a testing system that is superior to the FTC Method is feasible, and if it is, adopt this new method as the standardized testing system. In Re: Petition for Rulemaking Concerning Tar and Nicotine Testing and Disclosure, Before the Federal Trade Commission, September 18, 2002, pp. 32-33 (JE-045823). Second, Philip Morris asked the FTC to require tar and nicotine ratings with "mandatory disclaimers for all low-yield brands":

> These disclaimers, which should be required for low-yield brands tested under the Cambridge Method or under a new method if one is adopted, should communicate to the public in substance that:
>
> (1) low-yield cigarettes have not been proven to be less hazardous than other cigarettes and are not a substitute for quitting;
>
> (2) the amount of tar and nicotine that a smoker obtains from a cigarette depends on how the individual smokes the cigarette;
>
> (3) that smokers may intake more tar and nicotine than measured by the FTC testing methodology;

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> (4) that low tar cigarettes do not make quitting smoking easier than other cigarettes.

Id. at 33.

Finally, Philip Morris asked the FTC to adopt a rule regarding the use of descriptors:

> In light of the importance of descriptors in product differentiation, the FTC should adopt a rule expressly authorizing the industry to continue to use such descriptors, provided two conditions are met. First, the use of descriptors should be accompanied by the disclaimers generally described above to minimize consumer confusion…. Second, the use of these descriptors should be allowed, provided that words such as "light" and "ultra light" are used in a uniform fashion and correspond to ranges of average per cigarette yields as estimated by the Cambridge Method now or whatever improved method is selected by the FTC in the future. Use of descriptors in a uniform manner, accompanied by disclaimers, will further the FTC's goal of informing smokers about the relative yields reported by the testing method, enabling them to make educated decisions about whether and what brands to smoke.

Id. at 34.

Q. Has the FTC responded to this petition?

A. To date, the FTC has not decided what action, if any, to take with respect to Philip Morris' petition, but is still evaluating the issues raised in the petition. "Given the complexity of the scientific and policy issues raised," the Commission could not provide Philip Morris with a specific date when it thought it would reach a decision. Correspondence from Mary K. Engle (Associate Director, FTC, Division of Advertising Practices) to Jerome I. Chapman (Outside Counsel, Philip Morris), November 14, 2002 [2067319717] (JD-054547).

Q. Dr. Langenfeld, have any current or former FTC officials publicly discussed apparent disagreement between the FTC and many in the public health community regarding whether low-yield cigarettes provide a health benefit?

A. Yes. Dr. Jeremy Bulow, who is a former Director of the FTC's Bureau of Economics, wrote an opinion piece in January 2002 for *Forbes* in which he criticized some of the conclusions outlined in Monograph 13.

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1 **Q. What did Dr. Bulow say in this article?**

2 A. Dr. Bulow's opinion is that the NCI is pushing a cessation only policy, *i.e.*, the NCI is
3 unwilling to admit that some cigarettes may be less hazardous than others because such an
4 admission might encourage some individuals not to quit smoking. It is Dr. Bulow's opinion that
5 the NCI's policy is having some unintended consequences. Dr. Bulow explains that there is a
6 clear benefit to switching to low-yield cigarettes if a smoker is unwilling or unable to quit. Dr.
7 Bulow stated that the NCI's stance may cause smokers to smoke, to their detriment, higher yield
8 products. In addition, Dr. Bulow believes that the FTC is wise to wait for the Department of
9 Health and Human Services to make recommendations regarding improving the tar and nicotine
10 rating system, rather than yielding to anti-tobacco groups' petitions to eliminate the system.

11 **Thank you, Dr. Langenfeld. No further questions.**

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